TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION, APPELLANT,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JUNE 1, 1944.

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[fol. 1] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Respondent

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Respondent

(Case No. 4)

PETITION FOR ALLOWANCE OF APPEAL, ASSIGNMENTS OF ERROR, AND PRAYER FOR REVERSAL—Filed April 28, 1944

The State Farm Mutual Automobile Insurance Company, an Illinois corporation, considering itself aggrieved by the decision and final judgment of the Supreme Court of the State of Wisconsin rendered on January 18, 1944, motion for rehearing of the decision and judgment therein having been denied on March 14, 1944, in the above entitled cause, which said decision and judgment affirmed the judgment of the Circuit Court for Dane County, Wisconsin, dismissing the action brought by the State Farm Mutual Automobile Insurance Company against Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and holding that [fol. 2] Section 201.18 of the Wisconsin Statutes is constitutional and valid, although there was drawn in question the constitutionality of said law as applied to appellant under the Fourteenth Amendment to the Constitution of the United States of America, and under the full faith and credit clause, Article IV, Section 1, of the Constitution of the United States, hereby prays that an appeal by this appellant be allowed to the Supreme Court of the United

States herein to the end that said decision and judgment of the Supreme Court of Wisconsin may be there reviewed and considered and justice done this appellant, and that an order be made fixing the amount of bond required of appellant herein on such appeal and fixing the terms and conditions of a stay of proceedings pending such appeal and such other order and terms as may be just and proper.

Assignments of Error

The said appellant assigns the following errors in the record and proceedings of the Supreme Court of the State of Wisconsin: (These errors result from the construction placed by the Supreme Court of Wisconsin in a judgment and decision of January 18, 1944, (244 Wis. (adv. sh.) 429), upon a statute of Wisconsin (Section 201.18). This statute relates to unearned premium reserves required of insurance companies to reflect present and future estimated liabilities. The Wisconsin Supreme Court held that under said section of the Wisconsin Statutes, the appellant, an Illinois corporation, is required, as a condition to carry on business in Wisconsin, to create an unearned premium reserve upon membership fees collected in thirty-eight other states in which appellant is licensed. Under the laws of Wisconsin the membership fee is held to be a part of the premium collected. In the thirty-eight other states the membership fee is held not to be a part of the premium. [fol. 3] Under the laws of such other states the membership fee contract is accepted as binding and lawful, the fee collected is not required to be treated as part of the premium and no obligation of any kind exists for its return as a part of any premium or otherwise. As construed by the Wisconsin Supreme Court, the Wisconsin Statute requires the plaintiff to reflect upon its books an item as a liability, but in the thirty-eight other states as to business done in such states it is not a liability. Wisconsin has no interest in such membership fees and policyholders in Wisconsin can obtain no benefit from a reserve so required. As thus applied, the statute conflicts with the decisions of this court which hold that:

> "• • • the issue remains whether the insurance enterprise as a whole affects the New York (Wisconsin) interests as to give New York (Wisconsin) the

power it claims." *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313.)

(1) The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, was invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States of America as affecting contracts and operations of the said State Farm Mutual Automobile Insurance Company beyond the jurisdiction of the State of Wisconsin.

(2) The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, constituted a deprivation of property of the State Farm Mutual Automobile Insurance Company without due process of law and beyond the power of the State of Wisconsin, and therefore invalid as in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 4] (3) The Supreme Court of Wisconsin erred in not holding that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, was invalid and void as in violation of the full faith and credit clause, Article IV, Section 1, of the Constitution of the United States of America.

(4) The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, and its contracts made in states other than Wisconsin, under the existing facts, was invalid as in conflict with Article I, Section 10, of the Constitution of the United States, as impairing the obligation of contracts in violation of said constitutional provision.

(5) The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, so far as it purports to require the State Farm Mutual Automobile Insurance Company, an Illinois corporation, to set up reserves on membership fees collected in states other than Wisconsin is invalid and void as violative to the Constitu-

tion of the United States and the decisions of the Supreme Court of the United States under such constitution as affecting contracts and operations of the State Farm Mutual Automobile Insurance Company beyond the jurisdiction of the State of Wisconsin.

PRAYER FOR REVERSAL

For these errors the said appellant prays that the judgment of the Supreme Court of Wisconsin be reversed and judgment ordered granting to the appellant the relief prayed for in this appeal.

Robert M. Ries[illegible] P. O. Address: 1 West Main Street, Madison, Wisconsin. Herbert H. Naujoks, P. O. Address: 1 North La Salle St., Chicago, Illinois. (Attorneys for Appellant).

[fol. 5] Service of copy of the within admitted May 3, 1944.

——— ———, [not legible] Assistant Attorney General, Counsel for Appellee-Respondent.

[fol. 6] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

(Case No. 4)

ORDER ALLOWING APPEAL AND FIXING BOND—Filed April 28, 1944

The petition of the State Farm Mutual Automobile Insurance Company, an Illinois corporation, appellant in the above entitled matter, for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin, and the assignments of error filed therewith and the record in said cause having been considered;

It Is Ordered, that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of Wisconsin as prayed in said petition, and that the Clerk of the Supreme Court of the State of Wisconsin shall [fol. 7] prepare and certify a transcript of the record and

proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within 30 days from the date hereof.

It Is Further Ordered, that with the filing of the order with the Clerk of this Court, plaintiff shall file with and deliver to the Honorable A. A. McLeod, Clerk of this Court, a power of attorney and appointment as agent for service of all process in all actions and with respect to all claims arising or which may arise by reason of its doing business or its having done business in the state of Wisconsin, or for the collection of any penalties or fines under Section 348.488, Wisconsin Statutes, or under any other similar statute of the State of Wisconsin.

It Is Further Ordered, that the appellant, State Farm Mutual Automobile Insurance Company, an Illinois corporation, execute its bond with surety to be approved by the undersigned, in the sum of Fifty Thousand Dollars ($50,000.00), conditioned that if the State Farm Mutual Automobile Insurance Company, an Illinois corporation, shall pay all penalties and fines which may be imposed under Section 348.488, Wisconsin Statutes, and shall not later than the first day of September, 1944, file with the Clerk of the Supreme Court of Wisconsin, to be held by said Clerk subject to the further order and disposition by this Court, a list of policies written or renewed by defendant in this state during the period between May 1, 1942, and April 30, 1944, and showing as to each policy the name of the person to whom such policy was issued, the date thereof and the amount of premium received therefor, then the said bond shall become void.

[fol. 8] Said bond having been filed with the petition herein and being in due form and in proper amount, is accordingly approved.

In accordance with the terms and the conditions of said bond and the prayer of the petition for allowance of said appeal,

It Is Now Further Ordered, that pending decision of the issues on this appeal and the further order of the Court herein, the defendant in his said capacity as Commissioner of Insurance, his deputies, clerks and employees, agents and attorneys, be and they are hereby restrained and enjoined from interfering with plaintiff's business, agents or members in the State of Wisconsin by enforcing or attempting

to enforce any penalties or other liabilities incurred by plaintiff by reason of any business transacted or things done by the plaintiff in the course of its business in the State of Wisconsin between May 1, 1942, and April 30, 1944, and from interfering with any of the business so done by plaintiff or its agents during said period.

Dated this 28th day of April, 1944.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal.)

[fols. 9-46] Service of copy of the within admitted May 3, 1944.

Harold H. Persons, Assistant Attorney General, Counsel for Respondent.

[fol. 47] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

(Case No. 4)

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed May 17, 1944

Whereas, the parties to the above entitled action, by their respective attorneys, stipulated and agreed in the Circuit Court for Dane County, Wisconsin, and in the Supreme Court of the State of Wisconsin, that the above entitled actions should be consolidated for purposes of trial and decision in the Circuit Court for Dane County, Wisconsin, and in the Supreme Court of Wisconsin, and such cases were so consolidated and so tried and decided in both of said Courts, and,

[fols. 48-65] Whereas, the issues involved in the above entitled actions were identical except that two separate license years are involved, and,

Whereas, it is agreeable to the parties to the above entitled actions that the Clerk of the Wisconsin Supreme Court transmit to the Clerk of the Supreme Court of the United States a single combination record for both of the above entitled actions,

Now, Therefore, It Is Stipulated and Agreed, by and between the parties to the above entitled actions, by their respective attorneys, that a single combination record may be transmitted to the Clerk of the Supreme Court of the United States combining both of the above entitled actions on appeal to the United States Supreme Court and that the Clerk of the Supreme Court of the United States may print the records in both of said actions as a single record and the presentation of said cases to the Supreme Court of the United States and consideration thereof by the Supreme Court of the United States may be as if a single case only were involved.

Dated at Madison, Wisconsin, this 28th day of April, 1944.

R. M. Rieser, Herbert H. Naujoks, Counsel for Appellant; John E. Martin, Attorney General, by Harold H. Persons, Assistant Attorney General, Counsel for Appellee.

[fol. 66] [Caption omitted]

[fol. 67] In Circuit Court of Dane County

Action Instituted in May, 1942

State Farm Mutual Automobile Insurance Company, an Illinois Corporation, Plaintiff,

vs.

Morvin Duel, Commissioner of Insurance of the State of Wisconsin, Defendant

Action Instituted in April, 1943

State Farm Mutual Automobile Insurance Company, an Illinois Corporation, Plaintiff,

vs.

Morvin Duel, Commissioner of Insurance of the State of Wisconsin, Defendant

Notice of Appeal—Filed July 20, 1943

Please Take Notice that State Farm Mutual Automobile Insurance Company, plaintiff above named, hereby appeals

to the Supreme Court of the State of Wisconsin from the whole of a Judgment entered in each of the above entitled actions on the 3rd day of July, 1943, a copy of each of such judgments being hereunto annexed marked exhibits A and B and made a part hereof.

Dated July 19, 1943.

R. M. Rieser, Herbert H. Naujoks, Plaintiff's Attorneys.

To: John Martin, Attorney General; Harold H. Persons, Assistant Attorney General, Attorneys for the Defendant in each of said Actions.

Myrtle L. Hansen, Clerk of Circuit Court of Dane County, Wisconsin.

Service admitted this 20th day of July, 1943.

Myrtle L. Hansen, Clerk.

Due service admitted this 20th day of July, 1943.

John E. Martin, Attorney for Defendant.

[fol. 68] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

UNDERTAKING ON APPEAL—Filed July 20, 1943

Whereas the plaintiff in each of the above entitled actions appeals to the Supreme Court of the State of Wisconsin from a Judgment made and entered against it in each of said actions in the Circuit Court of Dane County, Wisconsin, in favor of the defendant in said actions and against the plaintiff, on the 8th day of July, 1943, dismissing each of said actions and dissolving and vacating temporary injunctions entered therein and

Whereas subsequent to the entry of said Judgments and pursuant to Stipulations entered in said actions, the court on the 10th day of July, 1943, approved said Stipulations and ordered and directed that in so far as said Judgments dissolve the temporary injunctions or temporary restraining orders in the respective actions above entitled the same shall be stayed for a period of ten (10) days from the date

thereof pending the filing of undertakings and bonds in compliance with which this undertaking is now sub-
[fols. 69-71] mitted,

Now, Therefore, in consideration of the premises and of such appeal, the undersigned Fidelity and Deposit Company of Maryland, a surety company duly organized and existing and duly authorized to transact surety business in the State of Wisconsin, does hereby undertake and promise on the part of the appellant in each of said actions that said appellant will pay all damages, costs and disbursements which may be awarded against it on the appeal in each of said actions not exceeding, however, the sum of Two Hundred Fifty ($250.00) Dollars in each of said actions.

And Whereas the appellant is desirous of continuing the stay so granted by the court on the 10th day of July, 1943, and in consideration thereof and of the premises, said Fidelity and Deposit Company of Maryland, a surety company as aforesaid, hereby undertakes and promises to pay to the defendant Morvin Duel as commissioner of insurance of the State of Wisconsin such costs or damages as may be incurred by said defendant in his said capacity or that may be awarded to said defendant by reason of the granting of the order or orders enjoining said defendant from interfering with the plaintiff herein pending said action and said appeal, including all loss or damage which may result from the issuance of said temporary restraining orders or temporary injunctions, while and during the time that such appeal shall be pending and until the same shall be decided upon appeal to the Supreme Court of Wisconsin not exceeding, however, the sum of One Thousand ($1,000.00) Dollars for damages in each of the actions above entitled.

In Witness Whereof, said surety company has caused these presents to be executed by its duly authorized officers and agents and its seal to be affixed hereto this 20th day of July, 1943.

Fidelity and Deposit Company of Maryland, by Reid M. Bergh, Attorney in Fact. (Seal.)

[fol. 72] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

BILL OF COMPLAINT—Filed June 3, 1942

The State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, brings this, its Bill of Complaint, against Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and for cause of action complains and alleges that:

1. The plaintiff, State Farm Mutual Automobile Insurance Company is and was during all of the times herein mentioned a mutual, non-profit automobile insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois and was and is a citizen and resident of said state with its chief office and principal place of business in the City of Bloomington, County of McLean, State of Illinois.

2. The defendant, Morvin Duel, is now and since September 27, 1939, has been, the duly appointed, qualified and acting Commissioner of Insurance of the State of Wisconsin, and is a citizen and resident of the State of Wisconsin, residing in the City of Madison, County of Dane and State of Wisconsin, and defendant's business office is located at the Wisconsin State Capitol, City of Madison, Dane County, State of Wisconsin.

[fol. 73] 3. During the year 1939 plaintiff made application to the Commissioner of Insurance of the State of Wisconsin in the manner and on the forms prescribed by said Commissioner for a license to do the various forms of automobile insurance business in the State of Wisconsin. After due investigation and consideration by the then Commissioner of Insurance, the said Commissioner being satisfied by such investigation that plaintiff had fully complied with all provisions of law applicable to it and that plaintiff's plan of operation, methods and practices in the conduct of its business and the character and value of its assets were

and are such as to safeguard the interests of its policyholders and the people of the State of Wisconsin, made and entered a finding and order to this effect and thereupon issued to plaintiff on the 13th day of July, 1939, a license to transact all forms of automobile insurance business in the State of Wisconsin for the license period ending May 1, 1940. A copy of this license is hereto attached and made a part hereof and marked "Exhibit 1". That since said 13th of July, 1939, plaintiff was and is qualified and entitled to transact business and hold property in the State of Wisconsin under and pursuant to the statutes of said state.

4. That plaintiff seasonably applied for a renewal of said license and for renewal of its agents' licenses for the period ending May 1, 1941, and plaintiff seasonably and duly paid all fees, taxes and charges in connection therewith, and fully and promptly complied with all applicable laws of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department so as to entitle plaintiff to a renewal of said licenses but notwithstanding, such application, compliance with law and payments, the said defendant, as Commissioner of Insurance of Wisconsin, [fol. 74] failed, contrary to law, to renew such licenses for the plaintiff company and the agents at the time the original licenses expired. That on or about the 18th day of May, 1940, the Commissioner of Insurance of Wisconsin, without having previously had any hearing and without opportunity for hearing, issued an order denying a renewal of license to plaintiff to do all forms of automobile insurance business in the State of Wisconsin for the license year ending May 1, 1941.

5. Thereupon this plaintiff commenced an action in the United States District Court for the Western District of Wisconsin to compel the said Commissioner of Insurance of Wisconsin to issue such license to plaintiff, agents' licenses to each of its agents, and to enjoin and restrain said Commissioner from interfering with plaintiff's business, agents and members pending the trial and disposition of said case. Said court action is now pending but is stayed because, pursuant to the provisions of Section 285.06 Wisconsin Statutes and Section 266 of the Judicial Code, as amended, (Sec. 380, U. S. C. A. Title 28) the Commissioner

of Insurance of Wisconsin commenced an action in the Circuit Court of Dane County, Wisconsin, to enforce said order of May 18, 1940, denying a renewal of license to plaintiff and an order was entered by the Circuit Court for Dane County, Wisconsin staying the effect of defendant's order and decision of May 18, 1940, pending trial and ultimate disposition of said action and that such stay is still in full force and effect.

6. Thereafter on or before May 1, 1941, plaintiff seasonably and duly made application to the Commissioner of Insurance of the State of Wisconsin for a renewal of license to do the various forms of automobile insurance business in the State of Wisconsin for the period ending May 1, 1942, and for agents' licenses for agents of plaintiff in Wis- [fol. 75] consin, and to that end complied with all conditions and requirements to entitle the plaintiff and its agents to licenses. On or about the 24th day of April, 1941, defendant notified plaintiff that he would refuse to renew plaintiff's license for the year ending May 1, 1942, and on or about the 5th day of May, 1941, the Commissioner of Insurance of Wisconsin issued a written order denying a renewal of license to the plaintiff for the license year ending May 1, 1942. Said order and decision of May 5, 1941, was received by plaintiff on May 6, 1941.

7. Thereupon said plaintiff commenced another action in the United States District Court for the Western District of Wisconsin to compel the said Commissioner of Insurance of Wisconsin to issue such license to plaintiff for the period ending May 1, 1942, and for agents' licenses for agents of plaintiff, and to enjoin and restrain said defendant Commissioner from interfering with plaintiff's business, agents and members pending the trial and disposition of said case.

8. Said proceeding is now pending in the United States District Court for the Western District of Wisconsin but is stayed because pursuant to the provisions of Section 285.06 Wisconsin Statutes and Sec. 266 of the Judicial Code, (Sec. 380, U. S. C. A. Title 28) the Commissioner of Insurance of Wisconsin commenced an action in the Circuit Court of Dane County, Wisconsin to enforce said order of May 5, 1941, denying a renewal of license to plaintiff and an order was entered by the Circuit Court for Dane County,

Wisconsin, staying the effect of defendant's order and decision of May 5, 1941, pending the trial and ultimate disposition of said action and that such stay is still in full force and effect.

9. Thereafter, the above two actions brought by the Commissioner of Insurance of Wisconsin to enforce his orders denying a renewal of license to the Company in the Circuit [fol. 76] Court for Dane County, Wisconsin, were consolidated and heard as one before Honorable Arold F. Murphy, Circuit Judge, who entered an order on July 8, 1941, overruling the demurrers interposed by plaintiff State Farm Mutual Automobile Insurance Company to the original complaints of the Commissioner of Insurance in the suits filed in the Circuit Court for Dane County, Wisconsin, with leave to file an answer within twenty days. The plaintiff, State Farm Mutual Automobile Insurance Company, appealed these orders overruling demurrers to the Supreme Court of the State of Wisconsin.

10. The said Supreme Court of the State of Wisconsin, on January 13, 1942, (240 Wis. 161, 1 N. W. (2nd) 887) made and entered its opinion and decision on demurrer, and solely on the basis of allegations in the complaint, and not on the merits, holding that the use of the life membership plan of the plaintiff company was not permissible under the Wisconsin Statutes and affirmed the said orders of the Circuit Court for Dane County, Wisconsin. Thereafter, plaintiff State Farm Mutual Automobile Insurance Company made a motion for rehearing of the decision of January 13, 1942, and on March 13, 1942, the said Wisconsin Supreme Court made and entered its decision and order denying the said motion for rehearing.

11. In its opinion of March 13, 1942, (2 N. W. (2nd) 871), on motion for rehearing, the Wisconsin Supreme Court restated the basis for its decision in the above causes, in the following language:

> "Some concern is expressed in defendant's brief upon rehearing whether the scope of the opinion is sufficiently circumscribed. While we are of the view that it is, we see no objection to reiterating that the decision is put upon the ground that defendant's plan violates the statutes because of its use of a membership

fee as the consideration for a life privilege—a fee to which is allocated a portion of the expenses of furnishing insurance protection, which is treated as earned at once and against which unearned premium reserves cannot be set up as required by the statutes."

On April 13, 1942, the plaintiff was notified that the remittitur in the aforestid causes was on that day filed in the Circuit Court for Dane County, Wisconsin. Thereupon, plaintiff herein (the defendant in the above actions) duly filed its answers therein and said actions are now pending in the circuit court for Dane County, Wisconsin.

12. Thereupon, on or about the 15th day of April, 1942, the plaintiff State Farm Mutual Automobile Insurance Company, in full compliance in every particular with the statutes of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department and with the construction of the Wisconsin Statutes relating to the rights of plaintiff and the power and duty of the defendant in the premises by the Wisconsin Supreme Court decisions of January 13, 1942 and March 13, 1942, made a new filing of rates and policy forms with the Commissioner of Insurance of the State of Wisconsin wherein and whereby the said plaintiff abandoned entirely, as of April 27, 1942, the use of its membership fee plan in the State of Wisconsin, and plaintiff, on and after the 27th day of April, 1942, adopted and put in force in Wisconsin a new policy and rates based on a level premium plan for both new and renewal rates. A copy of such schedule of rates and such policy are hereto atached and made a part hereof and marked "Exhibit 2". On and before May 1, 1942, and ever since, plaintiff's plan of operation and its methods and practices in the conduct of its business are, in every particular, in full compliance with all provisions of the Wisconsin Statutes, and more particularly, in full compliance with all provisions of the Wisconsin Insurance Laws and the applicable rules and regulations of the Wisconsin Insurance Department, and plaintiff's methods and practices in the conduct of its business and the character and value of plaintiff's assets are such as to safeguard the interests [fol. 78] of its policyholders and the people of the State. The plaintiff on April 15, 1942, renewed its request for a renewal of its license to do an automobile insurance busi-

ness in Wisconsin on the level premium plan for the license period ending April 30, 1943. The level premium plan now used by the plaintiff in Wisconsin is the plan used by most of the automobile insurance companies in the State of Wisconsin and said level premium plan is approved by the defendant for use in Wisconsin.

13. On and before May 1, 1942, and ever since, plaintiff complied fully in every particular with all of the provisions of the laws of Wisconsin, and the rules and regulations of the Commissioner of Insurance of Wisconsin applicable to plaintiff, so as to entitle plaintiff to a renewal of plaintiff's license to do all forms of automobile insurance business in Wisconsin and for the renewal of its agent's licenses and the appointment of new agents for the license period ending May 1, 1943, and plaintiff has paid all required and lawful fees, charges, and taxes due to the State of Wisconsin as a condition for doing business in Wisconsin for the renewal of plaintiff's license and that of its agents for the period ending May 1, 1943.

14. After the arbitrary and capricious refusal of defendant to issue a renewal of license to plaintiff for the license period ending April 30, 1943, said plaintiff commenced an action in the United States District Court for the Western District of Wisconsin to compel the said defendant, as Commissioner of Insurance of Wisconsin, to issue such a renewal of license to plaintiff and to enjoin and restrain said defendant from interfering with plaintiff's [fol. 79] business, agents and members, pending the trial and disposition of such suit. Said suit is now pending in said court and the temporary restraining order issued therein is in full force and effect but the proceedings therein are held in abeyance because, at the suggestion of the Judge of said Federal Court, at a hearing on defendant's motion to dismiss plaintiff's bill of complaint in said Federal Court, it was agreed by counsel, at the said Court's suggestion and with the said Federal Court's approval, that this action be commenced in the Circuit Court for Dane County, Wisconsin, in order to obtain a ruling on the disputed issue by the highest state court. The foregoing procedure was agreed upon because of the contention by counsel for defendant, that the issues raised by plaintiff's action to compel defendant to issue a renewal of li-

cense to plaintiff involved a construction of the powers and duties of defendant under Wisconsin Statutes, which, it was argued by defendant's counsel, had not been completely applied nor construed by the Wisconsin Supreme Court in its opinions of January 13, 1942 (240 Wis. 161, 1 N. W. (2d) 887), and March 13, 1942 (2. N. W. (2d) 871), and that hence an authoritative determination by the Wisconsin Supreme Court should be had rather than by a Federal Court.

15. The plaintiff, State Farm Mutual Automobile Insurance Company, was organized under the laws of the State of Illinois, and commenced business on June 7, 1922. Thereafter it was licensed to do business and is now lawfully operating in the following states, districts and countries, and it was first licensed in the years shown: Indiana, 1925; Missouri, 1925; South Dakota, 1925; Minnesota, 1926; Tennessee, 1925; Colorado, 1927; Nebraska, 1927; California, 1928; Mississippi, 1928; Montana, 1928; Nevada, 1928; North Dakota, 1928; Texas, 1928; Utah, 1928; Washington, 1928; Arizona, 1929; Idaho, 1929; New Mexico, 1929; West Virginia, 1929; Wyoming, 1929; North Carolina, 1930 (Company later withdrew, but in 1939 again applied for a license and was relicensed); Oklahoma, 1930; Oregon, 1930; Virginia, 1930; Arkansas, 1931; Alabama, 1932; Georgia, 1932; South Carolina, 1932; Delaware, 1933; Maryland, 1933; District of Columbia, 1934; Florida, 1934; Louisiana, 1935; Pennsylvania, 1937; Dominion of Canada 1928; Wisconsin, 1939; New Jersey, 1940. In every single state, district and country, except Wisconsin, the plaintiff has in the regular course annually received its renewal of license. Plaintiff has annually filed in every said state, district and country its sworn financial statement, report or other required data with reference to the solvency, reserves, surplus, methods, plan, operation and financial conditions of the plaintiff, which statements, reports of data have been received, examined, accepted and approved by all of the above Insurance Departments except Wisconsin, as being in full compliance with their laws, rules and regulations. In addition, the financial status and operations of the plaintiff have been regularly examined at intervals by and under the direction of the National Convention of Insurance Commissioners, and plaintiff's methods and plan of operation, the amount of and character of its assets,

its reserves, solvency and surplus have been all approved on each such examination as being adequate and in full and complete compliance in every particular and detail with all of the provisions of the applicable laws, rules and regulations of the states, district and country in which plaintiff so operates, as above set forth.

The license of the company has never been revoked or renewal thereof refused in any state, district or country, except as hereinbefore noted in Wisconsin.

[fol. 81] 16. The plaintiff company is in sound financial condition. Its annual sworn statement as of December 31, 1939, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $18,439,481.93; that its total liabilities as of that date were $13,175,205.12, which included the general or contingent reserve of $2,500,000.00. Its surplus over all liabilities as of that date, in addition to said contingent reserve of $2,500,000.00 was $5,264,276.81. Its annual sworn statement as of December 31, 1940, copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $21,490,934.62; that its total liabilities as of that date were $15,598,704.67, which included the general or contingent reserve of $2,750,000. Its surplus over all liabilities as of that date, in addition to said contingent reserve of $2,750,000, was $5,892,229.95; plaintiff's annual sworn statement as of December 31, 1941, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $25,510,220.50; that plaintiff's total liabilities as of that date were $19,312,790.88, which included the general or contingent reserve of $3,000,000. Plaintiff's surplus over all liabilities as of December 31, 1941 (in addition to said contingent reserve of $3,000,000) was $6,197,429.62.

As of January 1, 1940, the plaintiff, State Farm Mutual Automobile Insurance Company was examined under the authority of the National Convention of Insurance Commissioners of which the Wisconsin Insurance Department is a member, said examination covering the period from June 30, 1936, to and including December 31, 1939. The following states, acting for said National Convention of Insurance Commissioners, participated in said examination: Illinois, Arizona, Oklahoma and Kentucky; a copy of said

report of examination is on file with the Insurance Commissioner of Wisconsin. As of December 31, 1939, said examination showed that the plaintiff company had total admitted assets of $19,152,455.05; that its total liabilities, in-
[fol. 82] cluding a general or contingency reserve of $2,500,000 were $12,871,235.77, and its net surplus over and above all liabilities as of that date, in addition to said contingent reserve of $2,500,000 was $6,281,219.28.

The surplus as shown by the examiners was in excess of the surplus as claimed by the company in the amount of $1,016,942.47. The increased surplus as shown by the examiners is due to the fact that they assigned values to certain assets of the plaintiff company greater than claimed by the company in its annual statement and they found and considered certain liabilities of the company to be less in amount than stated by the company in its annual statement.

The present contingent reserve in the amount of $3,000,000 above referred to was created and exists for any and all possible liabilities of the Company of any nature whatsoever over and above the reserves already existing and for any contingencies of any kind that may in any manner affect the Company or its policyholders.

The surplus in the amount of $6,197,429.62 likewise is all available for the above purposes.

17. Plaintiff alleges upon information and belief that, at a hearing upon defendant's motion to dismiss plaintiff's complaint in the suit commenced by plaintiff in the United States District Court for the Western District of Wisconsin, counsel for defendant, in open court, stated that defendant's refusal to renew plaintiff's license was based upon the fact that the company operates upon the so-called life membership fee plan in certain other states, district and country.

Plaintiff further alleges that in those states wherein plaintiff operates upon the life membership plan no objection to the use of such plan has been or is being made by the Insurance Departments of such states and such plan is in full compliance with all provisions of the laws and ap-
[fol. 83] plicable rules and regulations thereunder in such states. In the states wherein plaintiff operates on a level premium plan, such states have not and do not object to plaintiff's use of the life membership fee plan in the states wherein plaintiff uses such life membership fee plan.

The life membership fee plan under which the plaintiff company does business in all states, district and country except Texas, Louisiana and Wisconsin where the company does business on the level premium plan and Arizona where the company does business on the unlevel or so-called staggered premium plan, is as follows:

Each applicant for automobile insurance is required to pay a separate membership fee for each general class or kind of automobile insurance which he desires to purchase. The membership fee does not purchase. The membership fee does not purchase insurance and is no part of the premium for insurance. The membership fee varies by insurance coverage and territory. The membership fee on an automobile risk for any given coverage, once paid, is never required to be paid again even though the applicant changes cars or lapses his insurance for a time and later reinstates the insurance. The contractual agreement between the defendant company and the policyholder as respects membership fees is as set out in the insurance policy used in most of such other states, and reads as follows:

> "The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for the coverage for which said fees were paid so long as this company continues to write such coverage and the insured remains a desirable risk."

This policy provision is contained in all policies pursuant to Section 1 of Article VII of the by-laws of the corporation, which reads as follows:

> [fol. 84] "Membership fees for the different kinds of insurance transacted by the corporation may be fixed in such amounts and upon such conditions as ordered by the Board of Directors and set out in the policy."

The purpose of the membership fee is to defray the expense of securing the new member and the expense of inspection and determining whether the applicant is eligible to belong to a selected, safety-conscious group of automobile owners entitled to purchase and renew automobile insurance in the company at a minimum cost.

Under this plan each applicant as a condition of admission to membership, himself bears the cost of establishing

his eligibility to insure in the company. This relieves the existing policyholders of this cost and thus reduces their expense of insurance. Each new applicant as he comes into the company, pays his own admission cost or expense as fixed by the company and such membership fee is earned at once by the company and is not returnable. Such life membership plan has been continuously used since the organization of the company.

The premiums, which vary as to coverage, type of car and territory where located, are collected separate from and in addition to the membership fees applicable. The first premium paid provides insurance for an original term of six months and the insurance may be automatically renewed for such successive periods of six months each as the required net renewal premium is paid by the insured on or before the expiration of the then current term of insurance. The premium for each six months term of insurance is and always has been entirely earned at the end of each six months' term. The rate of original and renewal premium is based on the underwriting experience of the company for the various coverages, type of automobile, and territories and is fixed by the Board of Directors of the company. Under the life membership plan the company does not make regular periodical payment of dividends to its policyholders, but accomplishes a saving to the policy-[fol. 85] holders by limiting its renewal premium to the approximate net cost of providing insurance protection.

The premiums charged by the company under its plan of operation are 20% to 35% less than the so-called conference rates, depending on the particular class of insurance carried. This lower cost of insurance is due to several factors:

(1) Plaintiff confines its risks to private passenger automobiles and the less hazardous form of commercial cars and selects its risks carefully which results in a more favorable loss ratio than enjoyed by most companies.

(2) All policies are issued in the home office of the plaintiff company which relieves the agents of this work and enables the plaintiff company to operate at a lower compensation cost to its agents, thereby reducing the company expense of doing business. Policies are not reissued upon renewal of the insurance, as is done by most companies,

which further reduces the company expense of doing business.

(3) It collects its premiums by mail direct from the policyholders which relieve the agents of this work and enables the company to operate at a lower compensation cost to its agents, thereby reducing the company expense of doing business.

(4) By collecting premiums direct from policyholders it escapes loss through bad accounts with agents suffered by many other companies where the agents collect premiums direct from the policyholders. By this means the company also escapes the cost which most companies have of maintaining accounts current with its agents.

(5) Plaintiff collects all renewal premiums on or before the due date and thus avoids furnishing insurance without receiving the premiums from policyholders. Under the plan used by most companies policies are frequently issued which are never paid for either by the policyholder or the agent. Plaintiff company avoids those losses.

[fol. 86] (6) Since Plaintiff receives premiums on or before the date when due it is able to earn interest on its premium funds or to enjoy the use of these funds in paying losses and expenses. Most other companies extend credit to the agent for sixty to ninety days and thus lose interest on and the use of these funds.

(7) By reason of the fact that the premiums are collected in cash direct from the policyholder the company is relieved of the expense of maintaining special agents in the field to verify accounts with agents and collect overdue premiums from agents.

This plan has been extended and operates in nearly all states of the union and Canada, though not used in Wisconsin, and has proven very successful and satisfactory *of* its policyholders. This plan has not been objected to as in violation of the laws or as being unsound, discriminatory or unreasonable in other states wherein plaintiff now operates on this plan.

The membership fee plan now being used by plaintiff in all states except Wisconsin, Louisiana, Arizona and Texas, has been is recognized as valid and in full compliance with all of the provisions of the applicable laws of such states,

and with the applicable rules and regulations of the Insurance Departments of such other states, and the Plaintiff has complied in every particular with all reserve and other financial and other requirements of such other states and of the applicable laws therein, and all of the business done by Plaintiff in such other states and Plaintiff's operations and practices are in full compliance with all of the laws of the states in which Plaintiff operates. Plaintiff's method and plan of operation in such other states, as well [fol. 87] as in Wisconsin, and the character and value of Plaintiff's assets and reserves are in full compliance with law in such other states, as well as in Wisconsin, and are such as to safeguard the interest of plaintiff's policyholders and the people of the states in which plaintiff operates.

18. Notwithstanding that plaintiff has fully and promptly complied with all laws, rules and regulations lawfully applicable to plaintiff as aforesaid and notwithstanding that plaintiff's plan of operation and its methods and practices in the conduct of its business and the character and value of plaintiff's assets were and are such as to safeguard the interests of its policyholders and the people of the State and that plaintiff is wholly solvent and in a strong financial position, and notwithstanding that it was and is the plain, unequivocal, ministerial duty of the Commissioner of Insurance of Wisconsin to renew plaintiff's license to do business in Wisconsin as aforesaid for the period ending May 1, 1943, and to renew plaintiff's agents' licenses and to permit appointment of new agents of plaintiff, said Commissioner of Insurance of Wisconsin, arbitrarily, capriciously, unreasonably, and in violation of law has refused to issue to plaintiff a license to do all forms of automobile insurance business in Wisconsin for the license year ending April 30, 1943.

19. Such unwarranted, capricious refusal to renew plaintiff's license and that of its agents for the periods from May 1, 1942 to May 1, 1943, unless restrained, will do irreparable injury to plaintiff and to plaintiff's business, for which plaintiff has no adequate remedy at law, except by this action in equity for an injunction herein. The action of defendant unless enjoined would completely destroy the [fol. 88] going business and the good will of plaintiff whereby plaintiff would suffer damages and loss greatly in excess of $25,000,000 and such injury to plaintiff's good

will and reputation would make it difficult, if not impossible, for plaintiff to recover its business, after defendant, as Commissioner of Insurance of Wisconsin, has been compelled to renew plaintiff's license and that of its agents at the end of the litigation.

20. Plaintiff further shows that it verily believes unless defendant is restrained by order of this court, that the said defendant, as Commissioner of Insurance of Wisconsin, will invoke upon this plaintiff large, unjust and unreasonable losses and irreparable losses and damages for which plaintiff has no other remedy at law that is just or adequate and that the writ of injunction is the only writ that can save and preserve to plaintiff its rights until the matters in controversy are adjusted in a lawful and orderly manner and until defendant has been compelled to renew plaintiff's license for the license year ending May 1, 1943, at the end of this litigation. The plaintiff now has in force in the State of Wisconsin approximately 23,000 risks and plaintiff's annual premium income from such risks is in excess of $400,000 and plaintiff's business is rapidly growing. Plaintiff has established and now maintains in Wisconsin an administrative office and agencies and also a large sales force and staff with loss adjustment bureau. Plaintiff now has in Wisconsin a force of approximately 500 agents, and plaintiff has invested, in organizing and building up such establishment, in excess of $25,000.00.

That prior to the first day of May, 1942, the plaintiff herein seasonably made application for a license for the license year ending May 1, 1943, and in connection therewith furnished all information and complied with all rules and regulations of the department and with all laws of the [fol. 89] State of Wisconsin as construed by the Wisconsin Supreme Court so as to be entitled to and was and is entitled to a license for the said period. That this proceeding is brought for the purpose of enforcing the rights of the plaintiff to a license for the license year expiring April 30, 1943, and for the purpose of protecting its business and business operations in the State of Wisconsin and to enable the plaintiff to obtain a determination of the issues presented by the defendant in his failure or refusal to grant a renewal of license to plaintiff company for the period ending April 30, 1943.

21. Plaintiff shows that the defendant, as Commissioner of Insurance of Wisconsin, has only such powers and duties as are delegated to the office of the Commissioner of Insurance of Wisconsin pursuant to and by virtue of the statutes of the State of Wisconsin; and that defendant's order refusing to renew plaintiff's license to do all forms of automobile insurance business in the State of Wisconsin for the period from May 1, 1942 to May 1, 1943, was and is wholly erroneous, arbitrary, capricious and without warrant in law and in violation of the positive ministerial duty imposed by statute upon defendant.

22. Plaintiff further alleges that the arbitrary, imperious, capricious, and unlawful refusal of the defendant to issue a renewal of license to the plaintiff for the license year ending April 30, 1943, by reason of the facts set forth herein, deprives the plaintiff of its property without due process of law and denies the plaintiff the due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and the similar provisions of the Constitution of Wisconsin, and im- [fol. 90] poses an arbitrary, unreasonable and unlawful interference with the plaintiff's right of contract in violation of Article I of the Fourteenth Amendment to the United States Constitution and impairs the obligations of contracts in violation of Section 10 of Article I of the United States Constitution.

23. Plaintiff further alleges that if the Statutes of Wisconsin are construed to permit the defendant, as Commissioner of Insurance, to exercise the broad powers said defendant claims, that is, to refuse under section 201.34, Wisconsin Statutes, to renew plaintiff's license for the license period ending April 30, 1943, said statute operates to impose an arbitrary and unreasonable interference with the right of contract in violation of Article I of the Fourteenth Amendment to the United States Constitution and impairs the obligations of contracts in violation of Section 10, Article I of the United States Constitution and said statute as so construed denied to the plaintiff company the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Wherefore the plaintiff respectfully prays that the said defendant, his deputies, clerks, employes, agents, servants

and attorneys be permanently restrained and enjoined from interfering with the plaintiff's business, agents or members in the State of Wisconsin in the conduct by the plaintiff of all forms of automobile insurance business in said state and as incidental to the final judgment herein that the defendant be required to issue to plaintiff and its qualified agents such licenses as are required by law and to which plaintiff and its qualified agents are entitled as set forth herein; that dur- [fol. 91] ing the pendency of this suit a temporary injunction issue restraining said defendant, his deputies, clerks, employes, agents, servants and attorneys and all other persons acting under his authority or by his direction from interfering with the plaintiff's business, agents or members in the State of Wisconsin and the conduct of all forms of automobile insurance business in said state; that pending the issuance of a temporary injunction a temporary restraining order issue enjoining and restraining the defendant his deputies, clerks, employes, agents, servants and attorneys and all other persons acting under defendant's authority or by his direction from interfering with the plaintiff's business, agents or members in the State of Wisconsin in the conduct of all forms of automobile insurance business and that the plaintiff have such other further order, judgment and decree as may be equitable and proper in the premises and for plaintiff's costs and disbursments in this action.

R. M. Rieser, One West Main Street, Madison, Wisconsin; Herbert H. Naujoks, One North LaSalle St., Chicago, Illinois, Attorneys for the Defendant State Farm Mutual Automobile Insurance Company.

Rieser & Mathys, Ekern, Meyers & Matthias, of Counsel.

[fols. 92-94] EXHIBIT I TO BILL OF COMPLAINT

STATE OF WISCONSIN

Department of Insurance

This is to Certify, that the State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, has complied with all the provisions of law, and is authorized to transact the business of — (15) Automobile, — in the

State until the first day of May 1940, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this 13th day of July, 1939.

——— ———, Commissioner of Insurance. (Seal.)

[fol. 95] *Duly sworn to by Adlai H. Rust. Jurat omitted in printing.*

[fol. 96] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF ADLAI H. RUST

ADLAI H. RUST, being first duly sworn, on oath deposes and says that he is one of the principal officers of the State Farm Mutual Automobile Insurance Company, plaintiff above named, to-wit: the Executive Vice-President of said plaintiff; that he is familiar with the facts hereinafter set forth; that he makes this affidavit for and on behalf of said corporation, being thereunto duly authorized; that said affidavit is made in support of a motion for temporary restraining order and temporary injunction; that the application for a temporary restraining order and temporary injunction herein is made in connection with a civil action in equity filed in this court to restrain and enjoin Morvin Duel, Commissioner of Insurance of the State of Wisconsin, from interfering with the business of the plaintiff and incident thereto to determine the powers and duties of the defendant as such Commissioner and his duty to issue a license to the plaintiff company for the licensing year ending April 30, 1943; that the Wisconsin Supreme Court on January 13, 1942 and March 13, 1942, made and entered decisions holding that the use of a life membership plan by the plaintiff company in Wisconsin was not permissible under the Wisconsin Statutes, and based its decisions upon its construction of the Wisconsin Statutes to the effect that it was im-

[fol. 97] proper to split premiums and designate part of the premium as a membership fee or separate charge; this conclusion was based primarily upon the construction by the Court of the reserve requirements of the Wisconsin Statutes; that [illegible]il 13, 1942, notice of the filing in the Circuit Cour[illegible] County, Wisconsin, on that date of

the remittitur in said Wisconsin case was received by plaintiff's attorneys and plaintiff thereupon on April 15, 1942, notified the said Morvin Duel, Commissioner of Insurance of the State of Wisconsin that plaintiff would on and after April 27, 1942, abandon in Wisconsin, the use of its life membership plan and that said plaintiff would on and after said April 27, 1942, use in Wisconsin a level premium plan both for new insurance and in renewal of existing policies; that on and after the said 27th day of April, 1942, plaintiff has abandoned the use of its life membership plan in Wisconsin and has operated in Wisconsin solely on the level premium plan as aforesaid.

That the company was legally licensed in Wisconsin on July 13, 1939, and its operations have been and are such as to safeguard the interests of its policyholders and the people of the State of Wisconsin; that the plaintiff has in all respects complied with the conditions laid down in the Wisconsin Supreme Court decisions of January 13, 1942, and March 13, 1942; that the plaintiff company has spent large sums of money in building an agency plant and developing its business in Wisconsin, which will be totally and irreparably lost unless the defendant is enjoined and restrained pending final determination of the issues presented herein and as prayed for in the complaint herein; that the company is wholly solvent, with total admitted assets in excess of $25,000,000.00, and that it has surplus over all liabilities in excess of $6,000,000.00 in addition to a contingent reserve of $3,000,000.00, and that the interests of more than 23,000 policyholders in Wisconsin are fully protected and will in nowise suffer by reason of the issuance of a temporary [fol. 98] restraining order or temporary injunction, pending a final determination of the issues herein; that the State of Wisconsin has received all taxes, charges and fees lawfully owing and that the revenues of the State of Wisconsin will not suffer by reason of the issuance of a restraining order or temporary injunction pending a final determination of the issues herein.

Adlai H. Rust.

Subscribed and sworn to before me this 18th day of May, 1942.

Willard S. Stafford, Notary Public, Dane County, Wisconsin. (Seal.)

My commission expires July 23, 1944.

[fol. 99] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ORDER TO SHOW CAUSE—May 19, 1942

Upon reading the verified complaint and the affidavit of Adlai H. Rust herein, and it appearing from the facts shown by said verified complaint and affidavit that before notice can be served and a hearing had on plaintiff's application for a temporary injunction herein, or on the plaintiff's application for a restraining order, immediate and irreparable injury, loss and damage will result to plaintiff, to-wit: Plaintiff's business and plant in the State of Wisconsin would be destroyed and become useless and all activities therein would be suspended and interrupted and its good will and reputation elsewhere would be damaged if defendant's failure or refusal to renew plaintiff's license to do business in Wisconsin for the period ending April 30, 1943, is not restrained and enjoined, inasmuch as plaintiff would be unable to operate lawfully in Wisconsin without a license and no new policies could be solicited or secured by plaintiff through its local licensed agents, and as a result said agents of plaintiff would leave the employment of plaintiff to solicit and secure automobile insurance policies for competitors of plaintiff and the policyholders now residing in Wisconsin would be unable to obtain any services in connection with their policies in this state and this, among other things, would cause said policyholders not to [fol. 100] renew their insurance with plaintiff company, and thus such threatened action of defendant would completely destroy the going business and good will of plaintiff in Wisconsin and such injury and destruction of plaintiff's good will, reputation and business in said State of Wisconsin would make it difficult, if not impossible, for plaintiff to retrieve its business if, upon final determination of this matter, it should be held that the defendant, as Commissioner of Insurance of Wisconsin, is required to renew plaintiff's license to do all forms of insurance business in Wisconsin for the license year ending April 30, 1943; and such injuries are irreparable because they cannot be compensated for in damages and may subject plaintiff to fines and forfeitures; and there is danger that such irreparable injuries are liable to occur, and are threatened

by the failure or refusal of the defendant to renew plaintiff's license before a hearing upon notice can be had;

Now, Therefore, It Is Ordered that the defendant, as Commissioner of Insurance of Wisconsin, show cause before Branch No. 2 of this court at the court house in Madison, Dane County, Wisconsin, on the 3rd day of June, 1942, at 10 A. M. why the defendant in his said capacity as Commissioner of Insurance, his deputies, clerks, employees, agents, and attorneys, should not be restrained and enjoined from interfering with plaintiff's business, agents, or members in the State of Wisconsin, and the regular conduct of the business and affairs of plaintiff, and why pending the entry of final judgment herein the defendant should not permit the plaintiff and its agents and representatives to continue their business and operations as if the defendant had complied with the law and had issued a license to plaintiff and separate agent's licenses to the individual qualified agents appointed by the defendent from time to time. Pending hearing upon this order to show cause and the entry of an order thereon, defendant is hereby restrained and enjoined [fol. 101] from interfering with plaintiff's business, agents, or members in the State of Wisconsin and from taking any steps to prevent the conduct of the plaintiff's business as heretofor-.

This restraining order shall become effective upon the giving of security by the plaintiff by filing an undertaking in the sum of $1,000, conditioned upon the payment of such costs and damages as may be incurred or suffered by said defendant if it should be finally determined that said order was improperly issued or that may be awarded to defendant by reason of the granting of said order.

It Is Further Ordered that a copy of this order be served upon said defendant, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, within three days from the date of this order.

Issued and entered this 19 day of May, 1942.

August C. Hoppmann, Circuit Judge, Branch No. 2.

[fol. 102] In Circuit Court of Dane County

[Title omitted]

Undertaking on Temporary Restraining Order

The undersigned hereby undertakes that the plaintiff above named, the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, shall pay to the defendant above named, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, such costs or damages as may be incurred or suffered by the said defendant, Morvin Duel, or that may be awarded to said defendant by reason of the granting of the order or orders hereinafter described, not to exceed the sum of One Thousand Dollars, including all loss or damage which may result from the issuance of the temporary restraining order now pending or a temporary injunction to be issued after hearing by the court herein if such injunction shall be issued within one year from the date hereof, if it should be finally determined that the said temporary restraining order or the temporary injunction was improperly issued.

Dated this 19th day of May, 1942.

Fidelity and Deposit Company of Maryland. (Seal.)

By: Reid M. Bergh, Agent.

[fol. 103] [File endorsement omitted]

In Circuit Court of Dane County

[Title omitted]

Received copies of the within Answer admitted this 6 day of June, 1942.

R. M. Rieser and Herbert H. Naujoks, Attorney for

Answer—Filed September 17, 1942

Now comes the defendant, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and for answer to the complaint herein, admits, denies and alleges as follows:

1. Admits paragraphs 1, 2 and 3 of the complaint except the last sentence allegation of paragraph 3 and as to said

allegation denies that since the 13th day of July, 1939, plaintiff was and is qualified and entitled to transact business or hold property in the state of Wisconsin under and pursuant to the statutes of said state, and in this connection alleges that the plaintiff was not on said date and was not at any time thereafter and is not now qualified and entitled to transact business or entitled to hold property in the state of Wisconsin under the statutes of said state.

2. Admits that the plaintiff seasonably applied for a renewal of said license and for renewal of its agents' licenses for the period ending May 1, 1941 and that plaintiff seasonably and duly paid all fees, taxes and charges in connection therewith. Denies that the plaintiff fully or [fol. 104] promptly or otherwise complied with all applicable laws of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department so as to entitle the plaintiff to a renewal of its said licenses. Admits that the defendant, as Commissioner of Insurance, refused to renew such licenses for the plaintiff company and its agents at the time that the original licenses expired and alleges that at all times since the defendant has refused to renew same. Denies that said refusal is contrary to law. Denies that the Commissioner's action of May 18, 1940 was without opportunity for hearing and in this connection alleges that the plaintiff's position and contention with respect to hearing before the defendant Commissioner of Insurance in relation to the order of the Commissioner of May 18, 1940 and the order of the Commissioner of May 5, 1941 (which later order is referred to in paragraph 6 of the complaint) was that the plaintiff did not want any hearing before the Commissioner thereon.

Defendant alleges that the circumstances relating to the order of May 18, 1940 were that the defendant had the plaintiff's application under advisement but that the defendant, as Commissioner of Insurance, had taken no official action with respect to plaintiff's application for renewal of its said license and those of its agents when, on May 11, the defendant received a letter from the Director of Insurance of the state of Illinois inquiring as to the status of the plaintiff company in the state of Wisconsin and suggesting to the defendant that said Director would like to receive notice of the defendant's proposed action in relation to the plaintiff's application for renewal of its license to do busi-

[fol. 105] ness in the state of Wisconsin in advance of defendant's official action in respect thereto. That in response to said letter the defendant duly notified the Director of Insurance as to the defendant's official action in respect to said application by a letter dated May 18, 1940 and by forwarding with said letter a copy of the defendant's findings and decision in said matter; that said findings and decision set forth in detail the various statutes with respect to which the plaintiff company's method and plan were at variance and not in compliance as well as why the plaintiff company's methods and practices in the conduct of its business were not such as to safeguard the interests of its policy holders and the people of the state; that at the same time notice of said decision and findings were transmitted to Ekern & Meyers at Chicago, attorneys for the plaintiff company, who had represented it in obtaining the original license and in the application for renewal thereof. That in defendant's letter to the Director of Insurance of the state of Illinois the defendant stated that if he received a statement from the company that it was withdrawing from the state within ten days it would not be necessary for the defendant to serve the said findings and decision upon the company and have the matter acted upon by the courts; that before the ten days expired the plaintiff company, without notifying the defendant that it intended to do so and without applying for any rehearing commenced the action in the United States District Court for the Western District of Wisconsin, referred to in paragraph 5 of the bill of complaint. Alleges that in that said action and as an ex parte matter, the District Court of the United States issued a temporary restraining order pending a hearing [fol. 106] upon the company's application for a temporary injunction; that the defendant was duly notified of the date for hearing upon said company's application for temporary injunction in the District Court, the said matter to be heard before a three-judge court convened pursuant to the provisions of sec. 266 of the Judicial Code as amended (sec. 380, U. S. C. A., Title 28).

3. Admits paragraph 5 except the allegation that "an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendants order and decision of May 18, 1940" and in this connection alleges that the Circuit Court for Dane County, Wisconsin issued a stay

order which stayed any and all action brought by the Commissioner of Insurance to enforce against the plaintiff company the provisions of the Wisconsin Statutes relating to foreign insurance companies doing business in the state and to enforce the defendants findings, determination and official action, pending the determination of the suit brought by the defendant Commissioner of Insurance to enforce same. Admits that said stay is still in full force and effect but denies that said stay was a stay of the effect of the defendant's order.

Defendant alleges that he was unable to bring his action, instituted in the Circuit Court for Dane County, on for trial and disposition prior to the expiration of the 1941 license year due to the plaintiff company's requesting adjournments or continuances from time to time, some of which the defendant, upon request, agreed to but the last one of which the defendant opposed and that the continuance granted by the Court with respect thereto was over the defendan's objection thereto.

[fol. 107] 4. Admits the allegations of paragraph 6 except the allegation that plaintiff complied with all conditions and requirements to entitle it and its agents to licenses, and denies same.

5. Admits the allegations of paragraph 7 and alleges that the plaintiff company in its action in the Federal District Court aforesaid again pursued the same remedy in the Federal Court and obtained, as an ex parte matter, a temporary restraining order from said Court pending a hearing upon the company's application for a temporary injunction; that the defendant was again duly notified of the date of hearing upon the company's application for a temporary injunction, said matter to be heard before a three-judge court convened pursuant to the provisions of sec. 266 of the Judicial Code as amended (sec. 380, U. S. C. A., Tit. 28).

6. Admits the allegations of paragraph 8 except the allegation that "an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 5, 1941" and in this connection alleges that the Circuit Court for Dane County, Wisconsin issued a stay order which stayed any and all action brought by the Commissioner of Insurance to enforce

against the plaintiff company the provisions of the Wisconsin Statutes relating to foreign insurance companies doing business in the state and to enforce the defendant's findings, determination and official action, pending the determination of the suit brought by the defendant Commissioner of Insurance to enforce same. Admits that said stay is still in full force and effect but denies that said stay was a stay of the effect of the defendant's order.

[fol. 108] 7. Admits the allegations of paragraphs 9, 10 and 11 except the allegation in paragraph 10 that the demurrer was "not on the merits", denies said allegation and alleges that the demurrer fully presented the case upon its merits.

8. Admits that on or about the 15th day of April, 1942, the plaintiff company attempted to file new rates and policy forms with the defendant and admits upon information and belief that as of April 27, 1942 the plaintiff company abandoned the use of its membership fee plan in the state of Wisconsin; admits upon information and belief that plaintiff on and after the 27th day of April, 1942 adopted and put in force in Wisconsin a new policy and rate plan based on the level premium plan for both new and renewal rates. Admits that Ex. 2, attached to the complaint, is a copy of the schedule of rates and policy form attempted to be filed with the defendant. Alleges that the plaintiff was informed at the time of the attempted filing that the defendant could not accept same; that plaintiff's unearned premium reserves were not and would not be by the proposed change, within the requirements of the Wisconsin Statutes and that such proposed filing was not in compliance with the Supreme Court decisions referred to in paragraph 12 of the complaint in that plaintiff's unearned premium reserves were not in compliance with the unearned premium reserve laws of the state of Wisconsin as construed by said Court in said decisions. Denies that said attempted filing or that the putting into operation of the new policy and rates above referred to was in full compliance with the Statutes of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department or with the construction of the Wisconsin Statutes in the Supreme [fol. 109] Court opinions hereinbefore referred to and in this connection alleges that said attempted filing and the

putting into force said policy and rates in the state of Wisconsin and the attempting of the plaintiff to do business thereunder was not in compliance with the said Supreme Court decisions but in defiance thereof and for the reason that the plaintiff's unearned premium reserves do not meet the requirements of the Wisconsin Statutes as those requirements were construed in said opinions. Denies that the plaintiff's methods and practices in the conduct of its business are such as to safeguard the interests of its policy holders and the people of the state. In this latter connection the defendant alleges that the plaintiff has always justified its life membership fee plan of writing insurance in that such plan gives the insured a valuable right to insure in the company pursuant to the terms of the policy provision set forth on page 12 of the complaint. Alleges that the plaintiff company claimed the right to be valuable in that the insured had a contract right to purchase insurance with the plaintiff company once the membership fee was paid, at its reduced rates, which rates were reduced because of payment of the life membership fee. The plaintiff compaay in its attempted filings of April 15, 1942 and its subsequent putting into operation a new level premium plan in the state of Wisconsin constitutes a breach and a complete abandonment by the plaintiff of the obligation assumed by plaintiff in the policy contract clause, hereinbefore referred to, in respect to all policy holders who, since plaintiff commenced doing business in the state, have paid [fol. 110] to the plaintiff life membership fees for the claimed valuable right referred to.

Defendant alleges that plaintiff has collected from policy holders in the state of Wisconsin, while it was unlawfully writing insurance upon a life membership fee plan, $137,737.50 in membership fees up to January 1, 1942, all of which money lawfully and in equity and good conscience belongs to and should be returned to said insureds as the plaintiff company cannot lawfully perform its contract obligation with them and has, by the new schedule of rates, abandoned its contract obligation with its said insureds. The defendant alleges that even if plaintiff's unearned premium reserves did meet the requirements of Wisconsin Statutes he would refuse to license the plaintiff company until it has returned to its insureds the life membership fees extracted from them and with respect to which it cannot give anything in return.

Admits that plaintiff, on April 15, 1942, renewed its request for a renewal of its license to do an automobile insurance business in Wisconsin on the level premium plan for the license period ending April 30, 1943. Admits that the level premium plan or similar level premium plans now used by the plaintiff in Wisconsin are plans used by most of the automobile insurance companies in the state of Wisconsin and that level premium plans are approved by the defendant for use in Wisconsin.

9. Denies all allegations of paragraph 13 except those that plaintiff has paid all required and lawful fees, charges and taxes due the state of Wisconsin as a condition for doing business and admits same.

[fol. 111] 10. Admits the commencement by plaintiff of the action in the United States District Court for the Western District of Wisconsin set forth in paragraph 14. Denies that defendant's refusal to issue the licenses was arbitrary or capricious. Admits the pendency of plaintiff's action commenced in the Federal District Court for the Western District of Wisconsin and that the ex parte temporary restraining order which plaintiff procured in said action was continued in full force and effect until such reasonable time as it would take plaintiff to commence the instant action in the Circuit Court for Dane County. Admits that such procedure was agreed upon at the suggestion of the judge of the Federal District Court for the Western District of Wisconsin but denies that it was the contention by counsel for defendant that the issues raised by plaintiff's action in said Federal District Court involved a construction of the powers and duties of the defendant which had not been completely applied or construed by the Wisconsin Supreme Court in the decisions referred to, and that hence an authoritative determination by the Wisconsin Supreme Court should be had rather than by a Federal Court, and in this connection alleges that the defendant took the position in the said Federal District Court that the decisions of the Wisconsin Supreme Court referred to had completely disposed of the issue which plaintiff sought to raise in said action and which plaintiff seeks to raise in this action and had disposed of said issue contrary and adversely to the plaintiff's position in that action and that defendant considered there was such little merit to the plaintiff's position

that he proposed to dispose of the matter by motion for summary judgment in the two prior actions which defendant instituted in the Circuit Court for Dane County and re- [fol. 112] ferred to in paragraphs 5 and 8 of the complaint herein, but that if the foregoing position were not true and there did remain any issue of law not settled by said decisions, then it would follow that the plaintiff in its action in the Federal District Court was asserting rights in said court under Wisconsin statutes which called for official action and under circumstances where that official's duty had not as yet been determined by the highest court of the state and that for a Federal Court to attempt to forecast that duty would be an abuse of discretion and reversible error under the doctrine of the federal cases cited and that in either event the complaint set forth no cause of action with respect to which the Federal Court could or should proceed.

11. Admits upon information and belief paragraph 15, except the allegation that the convention examination and reports found plaintiff's methods and plan of operation, the amount of and character of its assets, its reserves, solvency and surplus in full and complete compliance in every particular and detail with all the provisions of the applicable laws, rules and regulations of the states, district and country in which the plaintiff operates and with respect to said allegation denies same and alleges that the convention examinations and reports do not purport to find or determine whether the plaintiff company or any other company operates in full and complete compliance in every particular and detail with all the provisions of the applicable laws of the various states, districts or countries in which a company operates and does business.

12. Admits the allegations of paragraph 16 of the complaint except the allegation that the plaintiff company is in sound financial condition and in this connection alleges that [fol. 113] the plaintiff's life membership fee plan and method of operation which it uses in 38 out of 42 states, districts and countries in which it does business is such as to make it impossible to determine the plaintiff's surplus after setting aside unearned premium reserves as required by Wisconsin law and such as to make it impossible to compute and set aside the required statutory unearned premium re-

serves and such as to make it impossible for the plaintiff to meet the solvency requirements of the Wisconsin unearned premium reserve law.

13. Denies upon information and belief that counsel for defendant, upon defendant's motion to dismiss plaintiff's complaint in the Federal District Court, purported to make a comprehensive statement as to all of defendant's major objections and reasons for refusal to grant the plaintiff and its agents licenses and in this connection alleges that there are major objections to licensing the plaintiff and its agents, all of which have been asserted by the defendant at various stages of these proceedings, are matters of record therein and fully and completely known to the plaintiff, in addition to those set forth herein and which defendant is not asserting at the present time because of his belief that there is no merit to the present action for reasons herein set forth.

Defendant further alleges upon information and belief that the statement in paragraph 17 of the complaint "counsel for the defendant in open court, stated, that defendant's refusal to renew plaintiff's license was based upon the fact that the company operates upon the so-called life membership fee plan in certain other states, district and country" is not an accurate statement with respect to counsel's statement and alleges that it is not the position of the defendant [fol. 114] with respect to defendant's objection to plaintiff's life membership fee plan of operation used by the plaintiff in 38 out of the 42 states, districts and countries in which it does business and in this connection alleges that the defendant's objection to the life membership fee plan used in such states is not grounded upon the fact that the plaintiff uses such plan in said states or upon any question as to whether said plan is lawful or unlawful in said states, but that the plan itself, as used in said states is such as to make it impossible for plaintiff to comply with the unearned premium reserve laws and the solvency requirements in relation thereto with respect to foreign mutuals doing business in this state.

Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the second full paragraph of paragraph 17 of the complaint, but for purposes of this answer admits same. Admits that the plaintiff's life membership fee plan and its method of operation

thereunder in all states except Texas, Louisiana, Arizona and Wisconsin, since April 27, 1942, are substantially as set forth in paragraph 17 of the complaint, but alleges that for all purposes of the Wisconsin Statutes the plaintiff's life membership fee is "premium" and as such is not earned at once and cannot be treated as earned at once, and alleges that when the plaintiff company does business on the life membership fee plan as it did in Wisconsin until April 27, 1942 and as it does in all states except as above noted, the plaintiff company forecloses any possibility of its maintaining the unearned premium reserves required by Wisconsin law and required of all insurance companies doing business in Wisconsin, foreign and domestic.

[fol. 115] Admits that the contractual agreement between the company and its policy holders, as set forth in the policy with respect to life membership fees is as alleged in the complaint, paragraph 17, sub-paragraph 4, page 12, and complaint, paragraph 17, sub-paragraph 4, page 12, and that the by-law of the plaintiff company with respect to membership fees is as alleged in the complaint, paragraph 17, sub-paragraph 5, bottom of page 12 and top of page 13 of the complaint. Defendant has no knowledge or information sufficient to form a belief as to whether the purpose of the membership fee is as set forth in paragraph 17 of the complaint, sub-paragraph 6, page 13, but for purposes of this pleading admits same. Admits that the plaintiff company treats the life membership fee as one which by the contract is earned at once and as one which is not returnable and in this connection alleges that such is the plaintiff company's practice in all states in which it operates and uses the life membership fee plan and alleges that as a fee treated as earned at once the plaintiff company sets up no unearned premium reserves at all with respect to such life membership fee. Admits that the life membership fee plan has been continuously used by the plaintiff company since the organization thereof.

Defendant has no knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 17, sub-paragraph 7, page 13 of the complaint, but for purposes of this pleading admits same. Admits that the allegations contained in paragraph 17, sub-paragraph 8, page 13 and top of page 14 correctly state the company's practices with respect to its plan and method of operation under the life membership fee plan.

Admits that the "premiums" charged by the plaintiff (premiums designated as such in the policy) under its life [fol. 116] membership fee plan of operation are from 20 to 35 per cent less than the so-called conference rates, depending upon the particular class of insurance carried. Admits that the several factors (denominated (1), (2), (3), (4), (5), (6) and (7)), sub-paragraph 9 of paragraph 17 of the complaint, pages 14 and 15, are factors which the plaintiff uses in its system of writing insurance and that the method of writing insurance used by the plaintiff company is as set forth in said sub-paragraphs. Admits that said methods have economy advantages and in this connection alleges that such economy factors have both advantages and disadvantages. Admits that the plaintiff has extended and operates under the life membership fee plan in 38 states of the union and Canada; admits that said plan is not now used in Wisconsin, but alleges that it was used in Wisconsin continuously until April 27, 1942. Denies that the life membership fee plan has proved very successful and satisfactory to the policy holders of the plaintiff companies. Defendant has no knowledge or information sufficient to form a belief as to whether the life membership fee plan has been objected to as in violation of the laws or as being unsound, discriminatory or unreasonable in other states wherein plaintiff now operates on this plan but for purposes of this pleading admits the plaintiff's allegation that it has not been so objected to in said other states. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last full paragraph (sub-paragraph 11 of paragraph 17, page 15 and top of page 16 of the complaint) and therefore neither admits nor denies same, but for purposes of this pleading admits that so far as known to defendant plaintiff's life membership fee plan and its [fol. 117] methods and practices thereunder are in compliance with the laws of said states where it is permitted to use said plan, but in this connection alleges that such plan is one which may upon superficial analysis receive adminstrative approval as was the case when Commissioner Mortensen licensed the plaintiff company in 1939 but is one which is vulnerable when subjected to judicial scrutiny and attack as was the case in Wisconsin, and further alleges upon information and belief that the plan has been subjected

to judicial scrutiny and attack in few, if any, of the states, districts or countries in which the plaintiff company does business. Denies that plaintiff's assets and reserves are in compliance with the laws of the state of Wisconsin or that they are such as to safeguard the interests of plaintiff's policy holders and the people of this state.

14. Admits that the defendant refused to renew plaintiff's license to do business in Wisconsin for the period ending May 1, 1943, and to renew plaintiff's agents' licenses, but denies that said refusal was arbitrary, capricious or unreasonable. Denies that it was the ministerial duty of the defendant to issue any such licenses and in this connection, for reasons hereinbefore set forth, alleges that it was the plain duty of the defendant to refuse the renewal of such licenses.

15. Denies the allegations of paragraph 19 of said complaint and in this connection alleges that the plaintiff company has never lawfully conducted its business in Wisconsin and is not now doing so and that the plaintiff company never has been entitled to a license to do business in the state of Wisconsin and is not now entitled to such license or licenses.

[fol. 118] 16. Admits that the plaintiff now has in force in the state of Wisconsin approximately 23,000 risks and that plaintiff's annual premium income from such risks is in excess of $400,000 and rapidly growing; admits that plaintiff has established and now maintains in Wisconsin an administrative office and agencies and a large sales force and staff with a loss adjustment bureau; admits that plaintiff now has in Wisconsin a force of approximately 500 agents and that the plaintiff has invested, in organizing and building up such establishment, in excess of $25,000, but in this connection alleges that the plaintiff commenced doing business in this state by virtue of the license issued to plaintiff by Commissioner Mortensen on July 13, 1939, and which said license expired by its own terms on May 1, 1940; that the plaintiff knew at the time that it entered the state and commenced to build up its organization that it was extremely doubtful whether the plaintiff's method and plan of operation complied with the laws of the state of Wisconsin and whether such method and plan could be brought in compliance with the laws of said state. Alleges that when

plaintiff's license expired it had only some 160 agents in the state and some 2,000 risks which produced some $50,000 annual income for the plaintiff; that the plaintiff proceeded promptly with its first action in the Federal Court to tie the defendant's hands so it could go forward building up its organization so that it could continue to write its unlawful insurance. Alleges that whatever damage the plaintiff will suffer by reason of the defendant's refusal to license the plaintiff to do business in the state is damnum absque injuria and damage which the plaintiff has brought upon itself by its own action in the premises in its various at- [fol. 119] tempts to thwart and defy the laws of the state and which said laws the plaintiff still seeks to set at naught, thwart and defy in the instant action.

The defendant admits that he intends to enforce the insurance laws of the state against the plaintiff, but denies that he will invoke upon the plaintiff large, unjust, unreasonable or irreparable losses and damages for which plaintiff has no remedy at law that is just or adequate and denies that the writ of injunction is the only writ that can save and preserve to the plaintiff its rights until the matters in controversy are adjusted in a lawful and orderly manner or until the defendant has been compelled to renew plaintiff's license for the license year ending May 1, 1943 at the end of this litigation. Defendant admits that prior to the first day of May, 1942 the plaintiff seasonably made application for a license for the license year ending May 1, 1943 but denies that the plaintiff complied with all rules and regulations of the department or with all laws of the state of Wisconsin as construed by the Wisconsin Supreme Court so as to be entitled to a license for said license period. The defendant admits that the plaintiff professes to bring this action for the purpose set forth in paragraph 20 of the complaint, but in this connection alleges that the issue which plaintiff seeks to raise in the instant action has already been determined adversely to the plaintiff by the decisions of the Wisconsin Supreme Court, hereinbefore referred to, and that the plaintiff's action is wholly without merit.

17. The defendant admits that as Commissioner of Insurance he has only such powers and duties as are delegated to him by virtue of the statutes of the state of Wisconsin but [fol. 120] denies that his refusal to renew plaintiff's license

for the period May 1, 1942 to May 1, 1943 was or is erroneous, arbitrary, capricious or without warrant in law or in violation of any ministerial duty imposed by statute upon the defendant.

[fol. 121] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT—Filed Sept. 17, 1942

To: R. M. Rieser, Herbert H. Naujoks, Rieser & Mathys, Ekern & Meyers, Attorneys for Plaintiff.

You will please take notice that upon affidavits of Morvin Duel, defendant in the above entitled action, and John Lange, attached hereto, the records and documents referred to therein, and upon all the records, files and proceedings had herein, the defendant will move the Court for summary judgment pursuant to the provisions of sec. 270.635, Wisconsin Statutes, at a regular term thereof to be held at the Court House, Branch 2 of said Court, Honorable August C. Hoppmann, Circuit Judge presiding, on the 29th day of June, 1942, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated this 6th day of June, 1942.

John E. Martin, Attorney General; N. S. Boardman, Assistant Attorney General, Attorneys for Defendant Commissioner of Insurance.

Received copies of the within Notice of Motion admitted this 6 day of June, 1942.

R. M. Rieser, Herbert Naujoks, Attorney for ——.

[fol. 122] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF MORVIN DUEL—Filed Sept. 17, 1942

MORVIN DUEL, being first duly sworn on oath deposes and says that he is the Commissioner of Insurance of the State

of Wisconsin and the defendant in the above entitled action and that he believes that the said action has no merit.

That the defendant submits herewith, as part of this affidavit, the printed case and briefs in Cases No. 138 and No. 139, August, 1941 Term of the Supreme Court of the State of Wisconsin in an action entitled:

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Defendant,

the said briefs consisting of the defendant-appellant's original brief, the plaintiff-respondent's original brief, the defendant-appellant's reply brief, the plaintiff-respondent's reply to reply brief, the defendant-appellant's brief in support of motion for rehearing, the plaintiff-respondent's brief in opposition to motion for rehearing, the reply brief of the defendant-appellant in support of motion for rehearing and the plaintiff-respondent's reply to the reply brief of defendant-appellant in support of motion for rehearing.

[fol. 123] That the exhibits printed in the printed case, above referred to, are copies of public records or documents on file either with this court, the State Department of Insurance, or the office of the Attorney General.

That the letter of R. C. Mead, dated April 14, 1942 (Ex. D) attached to the affidavit of John Lange, and the attempted filings made at that time, constitute all of the information conveyed by plaintiff to affiant then or since with respect to any proposed changes or of what the plaintiff company proposed to do in relation to or supplemental to said proposed changes.

(Signed Morvin Duel.

Subscribed and sworn to before me this 6th day of June, 1942.

Inga B. Williamson, Notary Public, Dane County, Wisconsin. (Seal.)

My commission expires May 20, 1945.

[fol. 124] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF JOHN LANGE—Filed Sept. 17, 1942

JOHN LANGE, being first duly sworn, on oath deposes and says that he is Chief Actuary of the Insurance Department of the State of Wisconsin, and has occupied such position since April 1, 1930, and that from January, 1920 to April 1, 1930 he occupied the position of Assistant Actuary in said department; that in those positions it has been his duty to examine into the financial condition and affairs of companies licensed in the state and those applying for a license to be admitted to the state:

That all insurance companies applying for license or re-license are required to file a financial statement each year showing their financial condition at the end of the preceding calendar year, upon forms prescribed and furnished by the Insurance Commissioner, a copy of which said form is attached hereto marked Exhibit A and made a part hereof; that all domestic insurance companies are required to file like statements; that attached hereto and marked Exhibit B and made a part hereof is the financial statement of the plaintiff company filed with the Department, showing its financial condition as of December 31, 1941:

That, as shown by line 25 on said exhibits, page 5 and on page 7, companies are required to report the unearned premium reserve computed upon a country-wide basis, that is, all states, territories, districts and countries in which the said company does business or has business in force; that companies in reporting the unearned premium reserve are [fol. 125] not required or permitted to report said reserve separately by the various states, districts, territories or countries in which they do business or have insurance in force, but are required to set up one unearned premium reserve for all business transacted country-wide, as above set forth; that the foregoing is the same method and requirement of reporting unearned premium reserve adopted by the National Association of Insurance Commissioners in their Convention Reports; that an unearned premium reserve so computed must be set aside by each company

reporting before its surplus can be determined; that the one unearned premium reserve so set aside and so computed is the reserve which the commissioner of insurance and the department actuaries must examine and which they do uniformly examine to determine whether a particular company's unearned premium reserve meets the minimum requirements of the Wisconsin Statutes; that the foregoing has been true to affiant's knowledge ever since his employment by the Department in 1920, and that same was true and the existing practice at the time that affiant was first employed by the Department;

That, as shown by the annual financial statements of the plaintiff, which are public records and on file with the Wisconsin Department of Insurance, the plaintiff company is licensed to transact business in forty-one states, districts and provinces, exclusive of Wisconsin; that said records also show that the plaintiff uses its life membership fee plan of writing insurance in thirty-eight of said forty-one states, districts and provinces, exclusive of Wisconsin; that said records also show that the plaintiff does not consider or treat its life membership fees collected by virtue of said plan as "premium", and that the plaintiff sets up no unearned premium reserve whatsoever with respect to any life membership fees collected by it; that said records further show that the plaintiff treats its life membership fee as something entirely distinct and separate from premium in setting up the unearned premium reserve;

[fol. 126] That said records and other records in the Department show that the plaintiff used the life membership fee plan in Wisconsin continuously from July, 1939, when it was licensed by Commissioner Mortensen, to April 27, 1942; that said records further show the net premiums country-wide collected by the plaintiff company for each of the years 1929 to 1941, inclusive, including Wisconsin for the years 1939, 1940 and 1941, (premium as defined in the company's contract of insurance), to be as set forth in column 1, Exhibit C attached hereto and made a part hereof, and the life membership fees, countrywide, including Wisconsin for the years 1939, 1940 and 1941, collected in addition thereto for each of the years during the same period to be as shown by column 2 of said Exhibit; that column 3 of said Exhibit gives the same information with respect to net premiums collected in Wisconsin for

each of the years 1939, 1940, and 1941, and that column 4 of said Exhibit gives the same information with respect to membership fees collected in Wisconsin, for each of the years during the same period, all of which said information appears from the plaintiff company's annual statements and records on file in the Wisconsin Department of Insurance;

That Exhibit B, line 25, page 5 and page 7, includes no unearned premium reserve on the $14,532,744.91 of life membership fees collected and shown on Exhibit C, column 2, and no unearned premium reserve on life membership fees collected during the year 1928 and prior thereto, approximating an additional $450,000.00 of membership fees;

That attached hereto, made a part hereof and marked Ex. D is a copy of the letter of the plaintiff company, dated April 14, 1942, left with affiant on or about the 15th day of April, 1942, at the time that the plaintiff company attempted to file its level premium policy form and new rates with the State Department of Insurance; that the informa-
[fol. 127] tion contained in said letter and the forms attempted to be filed therewith constitute all the information which the plaintiff company furnished affiant then or since with respect to any proposed changes or of what the paintiff company proposed to do in relation to or supplemental to said proposed changes.

That at the time of said deliveries affiant advised the said R. C. Mead, in person, on behalf of the Department of Insurance, that the filings could not be accepted; that the plaintiff's unearned premium reserves were not and would not be by the proposed change within the requirements of the Wisconsin Statutes and that the Department could not agree with the third paragraph of said letter (Ex. D) which is to the effect that plaintiff's new proposals constituted a compliance with the Supreme Court decisions, referred to in paragraph 12 of the complaint, in that plaintiff's unearned premium reserves were not in compliance with the unearned premium reserve laws of the State of Wisconsin as construed by the Wisconsin Supreme Court in the decisions referred to.

That attached hereto, made a part hereof and marked Ex. E is one of the company's schedules of rates filed with the Department, which said schedule was in use by the plaintiff company from June, 1939 to April 27, 1942, as shown by the records of the Department.

Affiant further states that the plaintiff in its 1940 Federal District Court action, referred to in paragraph 5 of the bill of complaint in this action, alleged in substance, paragraph 5 of its bill of complaint, that at that time the plaintiff had 160 agents in the state and some 2,000 risks which produced some $50,000 annual income for the plaintiff, and that arrangements had been made with approximately 40 additional individuals to be licensed as local agents of the plaintiff. That said original bill of complaint is on file [fol. 128] in said Federal District Court and the copy served upon the Commissioner is on file with the Department of Insurance.

John Lange.

Subscribed and sworn to before me this 6th day of June, 1942. Inga B. Williamson, Notary Public, Dane County, Wisconsin. My commission expires May 20, 1945.

[fol. 129]

EXHIBIT "C" TO AFFIDAVIT

Net Premiums Gross Less Return Premiums:

	Col. 1 Net Premiums Country-Wide	Col. 2 Membership Fees Country-Wide	Col. 3 Net Premiums Wisconsin	Col. 4 Membership Fees Wisconsin
1941	$22,519,830 49	$2,574,985 82	$531,215 67	$98,987 50
1940	16,553,771 38	1,598,488 41	92,619 88	38,558 00
1939	14,977,793 29	1,181,354 91	7,867 00	192 00
1938	12,162,570 76	911,458 50	—	—
1937	10,960,757 80	952,909 26	—	—
1936	9,448,240 39	753,272 45	—	—
1935	8,126,894 94	769,871 39	—	—
1934	*7,734,741 00	755,531 03	—	—
1933	*6,613,466 00	702,046 81	—	—
1932	5,768,425 03	613,255 58	—	—
1931	6,220,919 17	904,286 53	—	—
1930	5,684,109 73	1,281,041 28	—	—
1929	4,469,316 33	1,534,242 94	—	—
	$130,340,836 31	$14,532,744 91	$631,702 55	$137,737 50

* These are net figures after deducting reinsurance ceded and taken from Best's insurance reports rather than from annual statements.

[fol. 130] EXHIBIT "D" TO AFFIDAVIT

State Farm Mutual Automobile Insurance Company

Bloomington, Illinois

April 14, 1942.

Honorable Morvin Duel, Commissioner of Insurance, State of Wisconsin, Madison, Wisconsin.

MY DEAR COMMISSIONER:

In the light of recent decision of the Supreme Court in the Case of Morvin Duel v. State Farm Mutual Automobile Insurance Company, we are herewith enclosing for filing, two copies of our revised Wisconsin automobile insurance policy (Form A9040.4), and two copies of a revised manual containing premium schedules for the various forms of insurance coverages on automobiles which we propose to make effective in Wisconsin as of 12:01, A. M., April 27, 1942.

It will be noted that we have eliminated the policy, in the manual and in the premium schedules, any reference to membership fees and the semi-annual premiums are on a level premium basis, alike for both new and renewal policies.

Having complied with the decision of the Supreme Court referred to, request is respectfully made for the renewal of the license of the State Farm Mutual Automobile Insurance Company and its agents in Wisconsin.

Very truly yours, (Signed) R. C. Mead, Actuary.

RCM e.
encls.

[fol. 131] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF PAUL F. JONES—Filed October 2, 1942

STATE OF ILLINOIS,
Cook County, ss:

Paul F. Jones, being first duly sworn on oath, deposes and says as follows:

That he is the duly qualified and acting Director of Insurance of the State of Illinois with his principal offices in the City of Springfield, Sangamon County, Illinois; that he was appointed as Director of Insurance of Illinois on January 20, 1940, and has since continuously occupied and filled the duties of said office;

That in addition to others, his duties include the regulation and supervision of both domestic, foreign and alien insurance companies, in accordance with the statutes; that he is familiar with the affairs, condition and history of the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois (hereinafter referred to as "the Company"), which was incorporated in the year 1922 in the [fol. 132] State of Illinois and licensed in said year by the State of Illinois to do all forms of automobile insurance business; that the said Company now lawfully operates and does business in forty states of the United States, in the District of Columbia, and in the Dominion of Canada; that to the best of affiant's information and belief, the license of the said Company has never been suspended or revoked in any state nor has renewal thereof been refused in any state at any time except in the State of Wisconsin; that the said Company is one of the largest exclusive writers of automobile insurance business.

That the annual statements of the Company have been filed on uniform forms or blanks prescribed by the National Association of Insurance Commissioners; that the financial condition of the Company is shown by such annual statements of the Company on file with the Department of Insurance of the State of Illinois and copies of which are on file with the Commissioner of Insurance of Wisconsin and

with the Insurance Departments of the several states, district and countries in which the said Company operates; that on the basis of said Company's financial statements, it is in a sound financial condition and has ample reserves to meet liabilities of all kinds and that the Company's surplus over all liabilities as reflected by its statement of December 31, 1941, was $6,197,429.62 (this was in addition to a general or contingency reserve fund of $3,600,000); that the Company's annual sworn statement as of December 31, 1941, showed total admitted assets of $25,510,220.50, and that the Company's total liabilities as of December 31, 1941, were $19,312,790.88, which included the general or contingency fund of $3,000,000.00;

That the Company was first examined by the Illinois Insurance Department as of December 31, 1924, and that the next examination of the Company was a Convention Examination made by representatives of the Illinois, Kansas and [fol. 133] Michigan Insurance Departments as of June 30, 1926; that convention examinations are thorough-going inquiries into the income, disbursements, assets, liabilities, including setting up of prescribed unearned premium and loss reserves, treatment by the Company of its policyholders, compliance with the laws, method of doing business and all other matters deemed important or material in determining the true financial and general condition and standing of an insurance company; that such examinations are made jointly by two or more insurance departments of states in which the Company is licensed to do business; that thereafter the said Company was subjected to six additional convention examinations by the Insurance Departments of several states and that such examinations were made as of December 31, 1927, July 31, 1929, January 30, 1931, June 30, 1933, June 30, 1936, and December 31, 1939; that each such examination of the Company hereinabove referred to was favorable; that continuously since its organization, the Company has operated in most states on the so-called "membership fee plan"; that under this plan each applicant for automobile insurance is required by the By-Laws and regulations of the Company to pay a separate membership fee for each general class or kind of insurance that he then or thereafter may wish to purchase. The membership fee does not purchase insurance and is no part of the premium for insurance which is a separate charge. By the terms of the policy contract with the policyholder, the member-

ship fee is not returnable but entitled the named insured to insure one automobile for the coverages for which the applicable premiums are paid so long as the Company continues to write the coverages requested and the insured remains a desirable risk.

The purpose of the membership fee is to defray the expense of securing the new member and the expense of inspection and determining whether the applicant is eligible [fol. 134] to belong to a carefully selected group of automobile owners entitled to purchase and renew automobile insurance in the Company. Under this plan, each applicant, as a condition of admission to membership, himself bears the entire cost of establishing his eligibility to insure in the Company and this relieves the existing policyholders of this expense and thus reduces their cost of insurance. The premiums vary as to coverage, type of car and territory where located, and are collected separate from and in addition to the applicable membership fees. The first premium paid provides insurance for an original term of six months and this insurance may be renewed automatically under the same policy on the same car for such additional periods of six months each as the required net renewal premium is paid by the insured on or before the expiration of the then current term of insurance.

That under the laws of the State of Illinois and under the contract between the Company and the policyholder, the membership fees collected in Illinois are not a part of the premium and hence no unearned premium reserve is required to be set up against such membership fees in the State of Illinois nor in any other state in which the Company does business except as otherwise held by the Wisconsin Supreme Court in the case of *Duel v. State Farm Mutual Automobile Insurance Co.*, 240 Wis. 161, in the State Wisconsin.

That unearned premium reserve liability of the Company was and is computed upon the premiums in force as is shown in each of the annual statements prepared by the Company and filed with the various Insurance Departments of the states wherein the Company does business, and in no instance was or is any item of membership fees included or required to be included in the computation of the unearned premium reserve liability of the Company; that the annual [fol. 135] statements prepared by the Company and filed

with the various Insurance Departments of the States wherein the Company does business purports to reflect the true financial condition and position of the said Company; that the Company's method of computing and setting up unearned premium reserves, as is shown by the annual statements filed by the said Company with the various Insurance Departments, is in full compliance with the laws of the State of Illinois and the applicable rules and regulations of the State of Illinois.

Paul F. Jones.

Subscribed and sworn to before me this 1st day of October, 1942. Marie Field, Notary Public, Cook County, Illinois. My Commission expires 19th day of March, 1946. (Seal.)

[fol.136] [File endorsement omitted

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF ADLAI H. RUST—Filed October 2, 1942

ADLAI H. RUST, being first duly sworn on oath deposes and says as follows:

That he is a resident of Bloomington, Illinois; that he is one of the principal officers of the State Farm Mutual Automobile Insurance Company, (hereinafter for convenience referred to as "the Company") and has been connected with the said company since its inception; that he now holds the offices of Executive Vice-President and Treasurer and has held both of these offices for several years; that he is a member of the board of directors of the Company and of the executive and investment committees thereof; that among other of his duties for several years last past, affiant has supervised the dealings of the Company with the various insurance departments of the several states and that the financial operations of the said Company are under his general supervision and control and that he is fully acquainted with the finances of the Company, its annual statements, the preparation and items thereof, and its methods and practices of doing business.

That the State Farm Mutual Automobile Insurance Company was incorporated in the year 1922 in the state of Illinois; that the said Company writes only automobile insurance and it commenced to do business on June 7, 1922 and confined its business to the state of Illinois until the [fol. 137] year 1925 when it was licensed to do business in the State of Indiana; that during the period from 1925 to date, the Company was licensed and now lawfully does business in the following states: (The figures after the state show the year when the Company was first licensed in each state.) Alabama, 1932; Arizona, 1929; Arkansas, 1931; California, 1928; Colorado, 1927; Delaware, 1933; District of Columbia, 1934; Dominion of Canada and Province of Ontario, 1938; Florida, 1934; Georgia, 1932; Idaho, 1929; Iowa, 1927; Kansas, 1927; Kentucky, 1927; Louisiana, 1935; Maryland, 1933; Michigan, 1926; Minnesota, 1926; Mississippi, 1928; Missouri, 1925; Montana, 1928; Nebraska, 1927; Nevada, 1928; New Jersey, 1940; New Mexico, 1929; North Carolina, 1930; (Company later withdrew, but in 1939 again applied for a license and was relicensed); North Dakota, 1928; Oklahoma, 1930; Oregon, 1930; Pennsylvania, 1937; South Carolina, 1932; South Dakota, 1925; Tennessee, 1926; Texas, 1928; Utah, 1928; Virginia, 1930; Washington, 1928; West Virginia, 1929; Wisconsin, 1939; Wyoming, 1929. That the license of the said Company has never been revoked in any state nor has renewal thereof been refused in any state at any time except in the state of Wisconsin. The Company was first licensed in the state of Wisconsin on July 13, 1939.

The Company is the largest exclusive writer of automobile business in the world and writes more automobile insurance than any other casualty company. That it transacts only an automobile insurance business covering all of the hazards of automobile ownership and operation and it limits its business to selected preferred risk drivers.

That the financial condition of the Company is as shown by the annual statements of the Company, copies of which are on file with the Commissioner of Insurance of Wisconsin and with the insurance Department of all states in which it operates.

That the Company's annual sworn statements of December 31, 1941, showed total admitted assets of $25,510,220.50

and that the Company's total liabilities as of December 31, [fol. 138] 1941 were $19,312,790.88, which included a general or contingent reserve fund of $3,000,000. The Company's surplus over all liabilities as of December 31, 1941 (in addition to said contingent reserve of $3,000,000) was $6,197,429.62. That the present contingent reserve in the amount of $3,000,000 was created by the Board of Directors of the Company by a resolution duly adopted on December 31, 1941, which is in words and figures as follows:

> "Be Is Resolved, that in lieu of the Contingency Reserve heretofore maintained by this Company in the sum of $2,750,000, a Contingent Reserve be and the same is hereby established in the sum of $3,000,000, and that appropriate entries to that effect be made upon the books and the records of this Company and in the financial statement for the year 1941 when the same is filed with the various Insurance Departments, and that said Contingent Reserve be and the same is hereby created and designated for any and all possible liabilities of the Company of any nature whatsoever over and above the reserves already existing and for any contingencies of any kind that may in any manner affect the Company or its policyholders."

That the contingent reserves shown in previous statements were maintained under similar previous resolution of the Board of Directors or the Executive Committee thereof.

That attached to this affidavit marked "Exhibit A" and by reference incorporated herein as a part hereof, is a tabulation showing the income and disbursements for the year, and admitted assets, Total Reserves excluding the Contingency Reserve, the Contingency Reserve and Surplus of the Company at the end of the year, for the years ending December 31, 1929 to 1941 inclusive.

That at the time of the application for admission of the Company to each of the states above listed and as of December 31st of each year thereafter, and in some states as of June 30th of each year thereafter, a sworn financial statement has been filed by the Company with the appropriate department of such state.

That the Company was first examined by the Illinois Department as of December 31, 1924, and that the next

examination of the Company was made by representatives of the Illinois, Kansas and Michigan Departments as of [fol. 139] June 30, 1926. That six Convention Examinations of the Company have been made, those examinations having been made as of the dates and conducted by the Insurance Departments of the states listed below:

Examination as of	*States Participating*
December 31, 1927	Illinois, Minnesota, Kansas, Missouri, Texas, South Dakota and Indiana
July 31, 1929	Illinois, Minnesota and South Dakota
January 30, 1931	Illinois, Kansas, Nebraska, Washington, Texas and West Virginia
June 30, 1933	Illinois, Missouri, Minnesota, Oklahoma and Virginia
June 30, 1936	Illinois, Texas, Alabama, Indiana, Pennsylvania and Louisiana
December 31, 1939	Illinois, Arizona, Oklahoma and Kentucky

That copies of said reports of examination when completed and certified, were filed with the Insurance Departments of each state in which the Company was then licensed to do business; that such reports, together with the annual reports of the Company were thereafter used and accepted by each of such states in issuing or reissuing licenses to said Company in the respective states.

That at all times since the inception of the Company, in all policies issued on the membership plan and in all states in which said plan was used, the membership fee had been treated as an item separate and apart from the premium, and not returnable to the insured, and as fully earned immediately upon the collection thereof.

That in each of said reports of examination, the unearned premium reserve of the Company was computed by the Examiners upon the premiums in force as of the date of examination and in no instance was any item of membership fees in any manner included or considered in the computation of the unearned premium reserve liability of the Company.

[fol. 140] That in each of said annual statements prepared by the Company and filed with the various insurance departments as above set forth, the unearned premium reserve liability of the Company was computed upon the premiums in force as of the date of the statement and in no instance was any item of the membership fees included or considered in the computation of the unearned premium reserve liability of the Company.

That at no time has any insurance department or any commissioner of insurance or any official of any state in a similar capacity, other than the Wisconsin Department ever raised the question or asserted that the unearned premium reserve as computed by the Company in its annual statement as above set forth was not properly computed or that its membership fees were a part of its premiums for the purpose of computing its unearned premium reserve liability, but in each instance other than in Wisconsin, it has at all times been recognized that membership fees collected by the Company under its plan of operation are not returnable to the insured, are immediately earned and are separate and distinct from the premiums charged by the Company for insurance.

That affiant first met Mr. Duel some time in the fall of 1939, his best recollection being that it was in the month of November; that at that time he called upon Mr. Duel at his office in Madison; that he was accompanied by Mr. G. J. Mecherle, Chairman of the Board of Directors of the Company, and that the purpose of their visit was to discuss the licensing of the State Farm Life Insurance Company in Wisconsin; that at that time they told Mr. Duel and Mr. Yaudes, a deputy in his office, that they were about ready for the State Farm Mutual Automobile Insurance Company to begin the solicitation and sale of insurance through agency operations in Wisconsin and asked him if there was any reason why they should not so proceed; that Mr. Duel told them that there was nothing pending before him that would prevent the Company proceeding according to the rates and policy form that it had on file with the Department.

[fol. 141] That prior thereto it had filed with the Department a copy of the rate manual, it had prepared for its Wisconsin agency force, and the policy forms it proposed to use in its Wisconsin business; that these were prepared

for use under its membership plan and in said rate manual the membership plan was explained and had been on file with the Wisconsin Department since about July 29, 1939.

That about January 1, 1940, it did proceed with agency operations and to write business upon the membership plan and so continued until April 27, 1942; that no business has been written by it on the membership plan on or after April 27, 1942.

That while writing business upon said plan the net memberships and premiums collected by it in Wisconsin are as follows:

Period	*Membership*	*Premiums*
1939	192.00	7,821.01
1940	38,588.00	92,619.88
1941	98,987.50	347,005.42
1942 to April 27, 1942	31,232.43	170,403.81
Total	$168,767.50	$617,446.41

That the figures for 1942 are approximate, and that the figures for the years 1939, 1940 and 1941 are those reported by the Company in its annual statement as filed with the various insurance departments, including the Wisconsin Department.

That no person who become a policyholder of the Company under a policy written upon the membership plan in Wisconsin has ever made any demand upon the Company, for the return of said membership or any part thereof because of the Company's alleged improper use of the membership plan in Wisconsin. That until the answer of defendant was filed herein plaintiff was not aware that defendant made any claim that plaintiff must return to policyholders membership fees collected in Wisconsin by the plaintiff.

[fol. 142] That the Company is ready, willing and able to discharge any liability that it may have on account of the collection of said memberships in Wisconsin.

That he has caused a survey to be made of the records of the Company as to cancellation of the policies written in the State of Wisconsin on the membership plan, and particularly of any such policies that were cancelled within the first six months of insurance. That any part of the premium returnable to the insured on the cancellation of

such policies has been returned. That if it should be determined that there is a liability upon the part of the Company to return the membership fees collected by the Company on said policies in the same ratio that said premiums have been returned, the amount so returnable from said membership fees to said insured is not in excess of $4,000.00.

That after the decision of the Supreme Court was filed in the case of Duel vs. State Farm Mutual Automobile Insurance Co. 240 Wis. 161, representatives of the plaintiff Company including this affiant, attempted to learn from the defendant Commissioner what, if anything, the plaintiff Company might do to meet the defendant's objections to its being relicensed in the State of Wisconsin and to comply with the Department's requirements, that it was not able to secure such an audience, but that in April such an audience with an Assistant Attorney General representing the defendant was had by counsel for the plaintiff and that after such meeting, a further meeting was had between said Assistant Attorney General, plaintiff's counsel and certain of its representatives including this affiant, at which time said Assistant Attorney General stated that he had discussed the subjects covered at the first meeting with the defendant Duel, and that it was then the Commissioner's position that there were no circumstances or conditions under which plaintiff Company could be licensed in the state of Wisconsin. That it was then and there also stated by the said Assistant Attorney General that [fol. 143] it was the defendant's position that if the plaintiff wanted to cause a new Company to be incorporated in Wisconsin, under either the mutual or stock plan, that defendant would not object to said new Company taking over the business of the plaintiff in Wisconsin. That it was also then stated that the new Company could not operate on any plan other than the so-called level premium plan, which is the plan upon which the plaintiff has operated in Wisconsin since April 27, 1942. That it was then and there stated by the Assistant Attorney General as the Commissioner's position that neither such Company or any other Company would be permitted to operate in the state of Wisconsin on the so-called staggered premium plan—a plan whereby the Company charges a larger premium in the first insurance period than in the subsequent periods of insurance, to cover the larger expenses, including acqui-

sition costs, which are a part of the cost in the first period and do not need to be either incurred or paid by the Company in connection with subsequent periods of insurance. That such staggered premium plan is designed to give the continuing and persistent policyholder the benefit of lesser expenses from smaller renewal commissions, avoidance of the necessity for rewriting policies, prompt payment of premiums, and the like. That because of the attitude of the defendant, even though the plaintiff considered the same to be erroneous, but in an effort to avoid further dispute and disagreement, plaintiff adopted the level premium plan and put it into effect in the state of Wisconsin on April 27, 1942.

That he attaches to this affidavit and by reference incorporates herein as a part hereof Exhibit "B", the same being copies of documents in the files and records of the Company relating to the question of whether the membership fees as charged by the Company are premiums under the laws of the various states, and holding that such membership fees are not premiums in said states; that he also by reference incorporates herein the opinion of the Supreme [fol. 144] Court of North Dakota in the case of *Kreifels vs. State Farm Mutual Auto Ins. Co.* 62 N. D. 667, 244 N. W. 880 (1931) and the opinions of the California Appellate Court in the case of *State Farm Mutual Automobile Insurance Company vs. Carpenter*, 87 Pac. (2d) 867, Cal. App. 1939, (Hearing denied in the California Supreme Court on April 21, 1939,) and of the Circuit Court of Multnomah County, Oregon, in the case *State Farm Mutual Automobile Insurance Company vs. Hugh H. Earle*, as Insurance Commissioner of the State of Oregon, Case #125-696, decided January 29th, 1938.

That he has made a tabulation showing the assets and surplus to policyholders of the mutual casualty companies of the country having assets in excess of $5,000,000 and that he has computed the ratio of the surplus of said companies to their assets. What the results of said tabulation and computation are set forth in an exhibit attached marked "Exhibit C" and by reference incorporated herein. That the figures used therein were taken from the 1942 Edition of Best's Insurance Reports, (Casualty, Surety and Miscellaneous Edition).

That said tabulation shows that there are sixteen companies having assets in excess of $5,000,000 and that State Farm Mutual Automobile Insurance Company ranks sixth amongst said companies in the ratio of surplus to assets, and that amongst the companies having assets in excess of $15,000,000 the State Farm Mutual Automobile Insurance Company ranks first among said companies in the relation of surplus to assets.

That the plan of writing automobile insurance upon the membership plan, as used by the State Farm Mutual Automobile Insurance Company is followed by numerous other companies who use a plan that is in substantial identity with the plan of the Company; that such companies are domiciled in the following states: Minnesota, Ohio, Indiana, Kansas, Illinois and Iowa.

That one or more of said companies operate in the following states: Minnesota, Connecticut, Delaware, Maryland, New York, Ohio, Pennsylvania, Vermont, Virginia, [fols. 145-146] Kansas, Illinois and West Virginia.

That such companies operating on the membership plan in 1941 wrote 22.64% of the total automobile premium volume written by the mutual casualty companies of the country and in 1940 such companies wrote 20.18% of such total; that affiant is informed and upon information and belief states that each and all of said companies compute their unearned premium reserve liability in the same manner as does the State Farm Mutual Automobile Insurance Company.

That this affidavit is made for the purpose of opposing defendant's motion for summary judgment in the above entitled action.

Adlai H. Rust.

Subscribed and sworn to before me this 30th day of September, 1942. Lazetta L. Hawk, Notary Public, McLean County, Illinois. My Commission expires the 13th day of June, 1945. (Seal.)

[fol. 147] EXHIBIT "B" TO AFFIDAVIT

Kreifels v. State Farm Mutual Auto Ins. Co.
62 N. D. 667, 244 N. W. 880 (1931)

Insurance—when insured's check given for payment of premium was refused payment, policy under terms thereof held void.

1. Where, in an application for a policy of insurance to be issued by a mutual insurance company, it is specifically stated that if there be default in the payment of the check given for premium deposit on the policy to be issued, when such check is due and presented for payment, that such default "shall immediately and automatically void the policy issued • • • without notice of any kind" to the applicant, such policy so issued is void, and the company has no liability thereunder when the bank upon which it is drawn refuses to pay the said check on the ground that there are not sufficient funds on hand for payment.

Insurance—the fact that applicant had due and owing him portion of premium deposits on other policies does not affect the policy issued upon application in question.

2. The fact that such applicant had due and owing to him from the said insurance company unused portions of premium deposits on prior policies and that he desired to have such portions applied as part payment on the premium deposit for this new policy does not affect the validity of the policy issued upon the aforestated application.

Opinion filed October 22, 1932.

Appeal from the District Court of Ward County, Moelring, J.

Reversed.

Nestos, Herigstad & Stenersen, for applicant.

L. J. Palda, Jr., C. E. Brace, and Robert W. Palda, for respondent.

BURR, J.:

The plaintiff, claiming to be insured by the defendant against injuries to an automobile by reason of collision,

brought suit upon his policy to recover the sum of $920 for damages to the car, loss of time, etc. The defendant answered alleging that the policy upon which the plaintiff sued never had been in force.

Each side made a motion for a directed verdict. The trial court made findings of fact and ordered judgment for plaintiff in the sum of $667 and costs. Judgment was entered accordingly and the defendant appeals.

There are sixteen specifications of error; but appellant says that upon the evidence introduced the plaintiff is not entitled to judgment under the terms of the policy upon which he sued, and a favorable decision of this question settles the case.

[fol. 148] April 13, 1931, the plaintiff made application for insurance of a Chrysler car against collision and for insurance against liability and property damage, upon an application blank furnished by the defendant. The application contained this provision:

"It is understood and agreed that the membership fee and premium deposit is to be paid at the time this application is signed, by a check made payable to the company, and that liability on the part of the company is subject to all provisions of the policy as to payment of membership fee and premium deposit, and that default in payment of such check, when due and presented for payment, shall immediately and automatically void the policy issued hereon without notice of any kind to the undersigned."

A membership fee for the right to secure insurance and for the benefits as a member of the company is required, but it is no part of the premium for insurance; and a separate membership fee is required for each class of insurance. An applicant is required to make a premium deposit for each class of insurance desired to guarantee the payment of his share of the losses—balance to be repaid to him. In order to secure insurance on his car against collision the plaintiff was required to pay a membership fee of $5, and a premium deposit of $7; to have insurance on "liability and property damage" he paid an additional membership fee of $5 and an additional premium deposit of $12. On the date the application was received the policy of insurance against collision and for "liability and property damage" was issued to the plaintiff for a period of six months and "for such terms of six months or thereafter as

the premium deposit is restored as required by this policy, and the application therefor". The liability of the company for insurance against collision is expressly made "subject to the terms and conditions forming a part of this policy."

Among the terms and conditions of the policy is the following: viz.: that "this entire policy shall automatically and immediately be void without notice of cancellation or notice of any other kind: (1) if there shall be default of any kind, or for any reason whatsoever, in payment of the check given for the membership fee or premium deposit when the same is due and presented for payment."

The membership fee is never returned to the policyholder, and has nothing to do with the premium, but gives him a right to obtain insurance, and for every class of insurance he is required to take out an additional membership.

The company is a mutual insurance company. Each member is required to "pay his share of the losses and expenses as billed by the company, to restore his premium deposit for the purpose of renewal," and when the losses are deducted from the deposit the member is notified as to the amount necessary to keep up the premium deposit to the amount required. In other words the applicant "must restore the premium deposit, so as to have the full amount of the premium for the purpose of renewal for the next six month period."

[fol. 149] It appears that some time prior to this application the plaintiff was a member of the company and had insurance upon a car, making a premium deposit of $10. He obtained a second policy and was required to make an additional premium deposit of $12; and thus had paid $22 as premium deposits. His share of the losses and expenses thereunder was $8.51, and before the application for this policy he was in default in this sum of $8.51. He then sought another policy, took out additional memberships and the premium deposits under this new policy amounted to $19. Therefore the applicant was required to pay in all, including his deficiency, the sum of $27.51. The plaintiff desired that the premium deposits of $22 already paid be applied on his debt which would leave him a credit of $13.49, and he would pay the company $5.51 in addition. It is clear, therefore, that he owed the company $19 on the new policy

and if they credited him with the $13.49 on this new premium deposit he could pay for his new insurance by getting a credit because of this balance, and paying $5.51 in addition. Until this credit was applied and the $5.51 paid there would be no adequate premium deposit on this new policy.

The plaintiff understood this and drew his check for $5.51 to cover the benefits under this new policy. Upon receipt of the check the policy was issued, subject to the conditions hereinbefore stated. The check was dated April 13, 1931, and was turned over to the accounting department of the defendant company on April 26, 1931, at Bloomington, Illinois. In due course of business it was transmitted to the bank upon which it was drawn, but this bank refused to cash the check, returning it as "unpaid for want of funds"—the check being returned to the defendant company on or before May 6, 1931. Thereupon the defendant, on May 13, 1931, wrote to the plaintiff returning the check, and calling his attention to the fact that it had been returned to them unpaid with the notation "insufficient funds" and that therefore the contract of insurance "has automatically lapsed on date of expiration."

These facts are undisputed. Plaintiff says he did not receive the letter nor the check; but he does admit that from time to time he received from his bank the checks cashed and he did not find this check among such checks, neither does he claim that the bank cashed the check for the defendant.

It is the claim of the plaintiff that he never received any notice of cancellation of his policy; but under the terms of his application which he himself signed, any policy issued upon said application became "immediately and automatically void * * * without notice of any kind" if his check was not paid when presented for payment. The plaintiff is a traveling man and therefore we assume he is more or less familiar with business methods. For years he had been engaged in selling Underwood typewriters and accessories. He makes no claim that he was ignorant of business dealings and transactions. He knew that he was not entitled to any notice of cancellation of his policy. The letter written to the plaintiff notifying him that the check was not paid and that the policy was cancelled was mailed to the plaintiff by United States mail and a carbon copy thereof was duly received as evidence in this case. From the evidence therefore it is apparent the check was returned to the plaintiff and he was

notified of the cancellation of his policy even though he says he did not receive the letter.

The defendant testified that during the month of April he had sufficient funds in the bank to pay the check had it been [fol. 150] presented during that time, though he had no knowledge or idea as to how much money he had in the bank. This however is immaterial. The policy was not dependent upon there being sufficient money in the bank to pay, but upon payment of the check when presented.

So far as these parties were concerned this check was presented within due time. There is nothing to indicate the bank was insolvent and it was the duty of plaintiff to have money on hand to pay his check. If he did, and the bank refused to pay it, this was a controversy between him and the bank. No finding was made by the trial court on whether the check was presented within a reasonable time, nor is the issue raised by the pleadings.

It is said the company was in possession of part of the premium, that the check for $5.51 represented but a small portion of the necessary premium, that the insurance company did not return the portion of the premium in his possession nor offer to return it, therefore it cannot be heard now to say there was no insurance in effect.

This claim of estoppel is not raised by the pleadings, though urged by respondent. But concededly a person could be a member of a company and yet have no insurance and also the company could owe him the return of a portion of a previously paid premium deposit. The membership fee has no bearing upon the insurance premium. Under previous policies the defendant had made premium deposits and after deducting his share of the losses there was to his credit with the defendant company the sum of $13.49. This sum was not a premium deposit on this policy. It was the portion returnable from other and prior insurance policy deposits. He had a right to ask the company to apply this debt due him, upon his insurance policy, and the company was willing to do so. No application of this credit was made. No application could be made until the full amount of the premium was paid. It is not a case of the company receiving a portion of the premium deposit for the policy issued and refusing to return it.

Respondent says that under the provisions of Sections 6532 and 6533 he was entitled to a return of these previous deposits, and he was. Section 6532 says 'a person insured

is entitled to return of the premium * * * when by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.' But this indebtedness due him from the company was not a premium deposit upon this policy unless so applied. A member in the company, may, after the amount of his losses is ascertained, leave any balance with the company for future appropriation, or he may have it returned to him. Hence the plaintiff could ask the company to apply it upon this insurance policy. He did do so, and the company was willing to credit him with it, if the insured would pay whatever extra was required. He did not do this so the company could not or did not make the application.

Section 6533 of the Complied Laws does not help the plaintiff. This section says: 'If a peril insured against has existed and the insurer has been liable for any period, however short, the insured is not entitled to a return of premiums so far as that particular risk is concerned, unless the insurance was for a definite period of time, in which case he is entitled to a proportionate return under sections 6517 and 6530'. Section 6517 refers to a surrender of an insurance policy for cancellation and Section 6530 refers to a return [fol. 151] of premium when there is insurance for a definite period and the policy is surrendered by the insured before the expiration of the term.

This policy was issued April 13, 1931, and was for the period of six months, or until October 13, 1931. Even if he were entitled to insurance for the proportionate time the amount due him from the company would not insure this car for a period past the end of August, and this collision occurred September 27, 1931.

We are of the opinion that upon the undisputed facts in this case the plaintiff was not insured in this company at the time of the alleged loss. The judgment therefore is reversed and judgment ordered for the defendant dismissing the action.

Christianson, Ch. J., and Nuessle, Birdzell and Burke, JJ., concur.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

No. 125-696

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY OF BLOOMINGTON, ILLINOIS, a Corporation, Plaintiff,

vs.

HUGH H. EABLE, as Insurance Commissioner of the State of Oregon, Defendant

MEMORANDUM OPINION

This is a suit for a declaratory judgment.

The statute, Section 46-109, provides:

"(1) Every foreign or alien company in its annual statement to the commission shall set forth the gross amount of premiums received by it from policies covering risks within the state during the preceding calendar year. It shall set forth therein, in separate items, return premiums, paid, payments made policyholders and considerations paid other companies for reinsurance in the state during such year, including premiums received for reinsurance of risks written by companies not licensed in this state during the preceding calendar year.

"(2) Computation and Charging of Tax.—If the commissioner find such report as filed by an alien or foreign insurance company to be correct, he shall compute an amount of two and one-fourth (2¼) per cent on the balance of such gross amount of premium after [fol. 152] deducting such return premiums, payments to policyholders for dividends and unabsorbed premiums and considerations paid for reinsurance in admitted companies, and charge the same to such company as a tax upon the business done by it in the state for the period shown by such annual statement. He shall forthwith mail to the last-known address of the principal office of such company 'a statement of the amount so charged against it, which amount the company shall pay to the comissioner on or before April 1 of each year. * * *

Section 46-1920 of the statute provides:

> "Tax upon insurance premiums for maintenance of department.—For the purpose of maintaining the department of the state fire marshal and paying all expenses incident thereto every insurance company transacting fire and automobile fire and theft insurance, and other insurers doing any insurance business within the State of Oregon, shall pay the insurance commissioner within sixty days after the passage of this act, and on or before the first day of April annually thereafter, a tax upon its premiums received from business transacted in this state as follows: A sum equal to one-half of 1 per cent of the gross premiums or assessments and dividends paid to policyholders received by it or them or its or their agents on direct business transacted by it or them in this state during the preceding calendar year, as shown by its statement on file in the insurance department."

The sole question involved in this case is whether certain membership fees, which anyone is required to pay who takes out insurance in the company, are a part of the gross premium.

The Supreme Court of North Dakota in the case of *Kreifels v. State Farm Mutual Automobile Insurance Company*, 62 N. D. 667, held directly the membership fee was not a part of the premium. The attorney general of the State of Michigan reached the same conclusion in a very lucid opinion, and Judge Maurice T. Tooling, Jr., of the Superior Court of California, in and for the county of San Francisco, reached a like conclusion.

A reading of the policy indicates clearly that the membership fees are not considered as a part of the consideration for the insurance.

The Court is of the opinion that the reasoning in these cases is clear and well founded, and therefore has reached the conclusion that the membership fees are not taxable [fol. 153] under the sections above referred to.

Dated at Portland, Oregon, this 29th day of January, 1938.

(Signed) John P. Winter, Judge.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 273,092

Dept. No. 1

(Extra Sessions)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, Defendant

MEMORANDUM ORDER FOR JUDGMENT

Affir[illegible]

I e[illegible] important[illegible] express briefly [illegible] for my decision.

1. The Propriety of the Remedy by Injunction.

A. Plaintiff has no adequate remedy at law. It is contended that plaintiff has an adequate remedy at law under Political Code, Sec. 3669. I do not so regard it. The section is discretionary with the State Board of Equalization insofar as credit for a previous overassessment is concerned. "The State Board of Equalization *may* at the time of the following assessment * * * credit such overassessment * * *" [fol. 154] While "may" is sometimes construed to mean "must" in statutory construction, it cannot bear that construction here because the use of the words "shall" and "may" in the same sentence shows that they were used designedly by the Legislature—"the Insurance Commissioner * * * *shall* include in his next annual report * * * a statement of the amount of premium and tax which * * * was overassessed, and the State Board of Equalization *may* * * * credit such overassessment * * *."

B. A public officer may be enjoined when he is acting beyond his statutory authority.

It is argued that under Sec. 526, Subd. 4, C. C. P. and Sec. 3423, Subd. 4, C. C., an injunction will not lie herein. But

these provisions are not applicable where the public officer is proceeding in a manner not authorized by the statute, or beyond the powers granted him by the statute. (*Payne v. English*, 79 Cal. 540, 548; *Pierce v. Los Angeles*, 159 Cal. 516; *Las Animas Land Co. v. Preciado*, 167 Cal. 580.)

2. Are the Membership Fees Here Involved a Part of the Gross Premiums of Plaintiff Within the Meaning of Cal. Const. Sec. 14, Art. XIII?

There can be no question that in ordinary usage "the word 'premium' in the law of insurance * * * means the amount paid to the company as consideration for insurance." (32 C. J. p. 1192, Sec. 324; 14 Cal. Jur. p. 469, Sec. 42.)

Under the testimony in this case (affidavit of Beedle admitted by stipulation) and the language of the application and policy I am satisfied that the membership fee is no part of the consideration for the insurance.

However, it is argued that under *Bankers Life v. Richardson*, 192 Cal. 113, it has been held that the tax on insurance companies under the constitution is a "gross earnings" tax and hence includes these membership fees whether premiums [fol. 155] or not. But the language in the Bankers Life case must be read in connection with the point actually decided, i. e. whether "Assessments", where insurance was written on the assessment plan, were taxable as "gross premiums". Considering the [illegible] history the court held that they were, [illegible] in so doing characterized the tax as a "gross earnings tax". But it must be remembered that "assessments" under that plan for insurance are equally the price paid for the insurance coverage, as are "premiums" in the ordinary policy; and I do not feel that the Supreme Court meant to go further in characterizing the tax as a "gross earnings tax", than to mean gross earnings from the writing of insurance. So construed it would not cover the membership fees here in question.

Judgment for the plaintiff granting a permanent injunction as prayed.

(Signed) Maurice T. Dooling, Jr., Judge.

December 15, 1937.

9-2789

Mr. Charles E. Gauss, Commissioner of Insurance, Lansing, Michigan

Dear Sir:

Re: State Farm Mutual Automobile Insurance Company

This is to acknowledge receipt of your letter dated November 5th, in which you request our opinion whether the membership fees charged by the State Farm Mutual Auto Insurance Company, of Bloomington, Illinois, may properly be considered part of the taxable premium within the meaning and the provisions of Sections 12377, 12331 and 12666 of the Compiled Laws of Michigan for 1929, as amended.

[fol. 156] The policy of insurance issued by the company in Michigan contains the following provisions:

> "This insurance is for only such and so many of the following coverages as are indicated by a specific premium in writing set opposite thereto."

The schedule describes specific coverages and states the respective membership fees and premiums for each type of coverage. It further recites that, "in consideration of the premiums hereinafter mentioned, (it) does insure," the assured for the term, coverages, and limits indicated. It also provides that "the contingent liability of the assured is limited to an amount equal and in addition to the premium set out in this policy, and then only for his equitable share of losses and expenses incurred while he was insured. The membership fees set out in this policy, which are in addition to the premiums are not returnable but entitle the assured to insure one automobile for the coverages for which said fees were paid so long as this company continues to write such coverages and the assured remains a desirable risk."

The by-laws of the company provide that the "membership fees for the different kinds of insurance transacted by the corporation may be fixed in such amounts and upon such conditions as ordered by the Board of Directors and set out in the policy." The by-laws contain a similar provision with reference to the premiums for different kinds of insurance.

The general agency contract between the company and the Mutual Agency Company discloses that the entire membership fee collected in Michigan is paid as commission or compensation to the general agent, and that the company keeps no part of it.

Section 12665, subsection 12 of the Compiled Laws of Michigan for 1929 provides as follows:

> "The taxable premiums of any mutual insurance company admitted in this state under this chapter for the purpose of taxation under any law of this state shall be the gross direct premiums received for insurance upon property or risks in this state, deducting premiums upon policies not taken and premiums returned on cancelled policies and also any so-called dividend or other return made to the policyholder other than for losses: Provided, that in case of any company receiving deposits or deposit premiums, the taxable premiums shall be the portion of such deposits or deposit premiums earned during the year."

A premium is commonly defined as consideration paid for insurance.

> "Gross premiums generally mean all premiums that remain in the treasury of the company, without counting any deductions for commissions for agents or the expenses of doing business."
>
> (Citing Cooley on Taxation, (4th Ed.) Sec. 941, page 1889; *People v. Miller*, 70 N. E. 10).

[fol. 157] In this case several facts are present which militate against the membership fee being taxable as a premium under the Michigan Act. In the first place it is expressly excluded by the terms of the policy contract from the price or consideration paid for insurance. In itself, the distinction would not be controlling, but by the terms of the policy, all assessment liabilities are predicted upon and fixed with reference to the amount of the premium paid, expressly excluding the membership fee. Furthermore, the membership fee, as explained by the company in a written brief, is payable only once, while a uniform insurance premium is paid regularly for each term or renewal. To hold that a membership fee constitutes a premium under the circumstances is to sanction a discrimination in rates against policyholders not subject to additional

membership fees and insured for the same kind of risks. The membership fee is never returned to the policyholder on cancellation or termination of the policy. It has been held by a court of competent jurisdiction that being solely a membership fee, it is unavailable for the payment or purchase of extended insurance.

(Citing *Kreifels v. State Farm Mutual Auto Insurance Company*, 62 N. D. 667).

That the company benefits from the collection of the membership fees is not open to serious question, but the benefit is of a nature that is legally distinguishable from the expressed and actual consideration paid for insurance. There are other considerations which might be urged in support of this conclusion, but inasmuch as any reason that may be presented in support of the contention that the membership fee constitutes a taxable portion of the gross premium, advances, at most, a doubtful interpretation of the act, we are constrained from expressing a contrary conclusion by force of the established principal of law that tax statutes must be construed strictly in favor of the taxpayer, and that ambiguity or uncertainty must be resolved in favor of the taxpayer.

> "Words 'premiums on insurance', when used in statutes, must be given their generally accepted meaning in absence of something in the context or other portion of the statute showing a different legislative intent.
>
> "Statutes creating taxes are strictly construed and are not extended by implication beyond clear import of language used."
>
> "Citing *Daniel v. Life Insurance Company of Virginia*, 102 S. W. (2d) 236 (1937).

It is therefore our opinion that the membership fee received in Michigan by the State Farm Mutual Auto Insurance Company does not constitute a taxable portion of the gross direct premiums received by the company for insurance upon property or risks in this state.

Very truly yours, Raymond W. Starr, Attorney General, by John H. Brennan, Deputy Attorney General.

JT:gy

[fol. 158] Official Minute of Meeting Board of Insurance Commissioners

Austin, Texas

Date: January 25, 1937

Members Present:	Yes
R. L. Daniel	Yes
Marvin Hall	Yes
R. C. Waters	Yes

Subject Considered:

Re: State Farm Mutual Automobile Insurance Company, Bloomington, Illinois—Membership Fees

General Remarks and action taken:

At a meeting of the Board of Insurance Commissioners of Texas on this 25th day of January, 1937, came on for consideration the question of whether or not the membership fee charged by the State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, should be treated as part of the premium. It appearing that the supreme court of some other States has held that this membership fee was not a part of the premium and there being no authority on the question in the State of Texas, the Board is of the opinion that it should follow the decisions of the higher courts of other states:

Therefore, it is ordered by the Board that, in figuring the premium income of the State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, for tax purposes in Texas, the membership fee shall be excluded and not treated as part of the taxable income of said company.

(Signed) R. L. Daniel, Life Insurance Commissioner, Chairman; Marvin Hall, Fire Insurance Commissioner; R. C. Waters, Casualty Insurance Commissioner.

INSURANCE DEPARTMENT

R. E. O'Malley
Superintendent

J. Frederic Allebach
Deputy Superintendent

State of Missouri, Jefferson City

February 12, 1937.

State Farm Mutual Automobile Insurance Co.
Bloomington, Illinois.

GENTLEMEN:

[fol. 159] We received your letter of January 25 in connection with the tax on membership fees collected in the State of Missouri. We have also received the brief of your counsel on the question as to whether or not Section 5979 Revised Statutes of Missouri, 1929, is applicable to such fees.

We have come to the conclusion that the membership fee paid by each insured over and above the actual premium or assessment collected for insurance is not a payment in the nature of a premium; that the part of Section 5979 which provides that every foreign insurance company or association shall "annually pay tax upon the premium received" cannot be construed to apply to the membership fee.

Yours very truly, (Signed) J. P. Allebach, Deputy Superintendent.

JPA:FN

DEPARTMENT OF INSURANCE

Oklahoma City, Oklahoma

November 5, 1936

Ekern & Meyers, One LaSalle Street, Chicago, Illinois.

GENTLEMEN:

In view of the explanation contained in your letter of October 19, and after having discussed the question of additional taxes with your Mr. Matthias, we have come to

the conclusion that membership fees collected by the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, in this state are not taxable as a part of the premiums collected by the company in Oklahoma.

Thanking you for your consideration in this matter, we are

Very truly yours, (Signed) Jess C. Read, Insurance Commissioner; by F. H. Petrie, Assistant.

[fol. 160] STATE INSURANCE DEPARTMENT OF MARYLAND

Baltimore

December 19th, 1936.

Ekern & Meyers, Esqs., 1 LaSalle St., Chicago, Ill.

Attention Mr. Erwin A. Meyers

DEAR MR. MEYERS:

I have carefully read and considered yours of Dec. 17th, and have reached the conclusion that the facts and the law covering the case of the State Farm Mutual Automobile Insurance Co. justify the position that membership fees collected by said company are not part of the consideration for the insurance, and therefore should not be included within the term "gross premiums", and therefore should not be subject to the Maryland tax on gross premiums.

Yours very truly, (Signed) W. S. Hanna, Insurance Commissioner.

April 2, 1937.

Mr. Charles F. Robbs, Commissioner of Insurance, Building.

Subject: Premium Tax on Membership Fees of State Farm Mutual Automobile Insurance Company

DEAR SIR:

G. S. 40-252, subsection 3 under Insurance Companies Organized under the laws of other States, provides that in

addition to other fees, any mutual fire insurance company, and any mutual automobile indemnity association shall pay a tax annually upon all premiums received, at the rate of 2% per annum.

G. S. 40-1211 states:

> "The taxable premiums or premium receipts of any mutual insurance company organized in or admitted to this state for the purpose of taxation under any laws of this state, shall be the gross premiums received for direct insurance upon property or risks in this state, deducting premiums upon policies not taken, premiums returned or cancelled policies, and any refunds or returns made to policyholders other than for losses."

[fol. 161] The question in this case is whether or not certain so-called membership fees charged by this company are taxable as premiums. It appears that any applicant for insurance must sign an application, and states that he makes application for membership in the company and for insurance in the company. For each different type of insurance he desires, he must pay a separate and distinct membership fee, also a stated sum, which, according to the contract of insurance, is a premium for the insurance. After the membership fee is paid he may continue his policy in force by paying at stated periods the premium designated, but no additional membership fee is paid. The evidence further showed that this membership fee was used by the company for the purposes of paying its agent who secured the business, who received approximately 50% thereof, and that the other 50% went into the general revenue of the company, was segregated and used for the purpose of investigating the applicants as to whether or not they were insurable; and second, the maintaining of a travel bureau of information; and third, for the expense of the company in putting the applicants named on the books of the company as members thereof.

The true test of premium and the meaning thereof is set forth in 32 C. J. P. 1192, as the consideration or the amount paid to the company as consideration for the insurance or for the policy. This definition is agreed to by the company on p. 2 of their letter to you under date of March 30, 1937, signed by Erwin A. Meyers.

As a result thereof, it seems to me that the true test in this case as to whether or not the so-called membership fee is taxable is whether or not in fact it is a premium income of the company, and is a part of the consideration for the issuance of the insurance or policy.

Viewing it from this light, it must be said that no distinction can be made for commissions of agents or the expense of carrying on the business of the company as a separate and distinct item from the premium for taxation purposes.

In *People, ex rel. Continental Insurance Company v. Milliger*, (N. Y. Ct. of App.) 70 N. E. 10, wherein a tax on gross amount of premiums received by comestic companies for business done in the state was under discussion, and where the Insurance Commissioner exacted a tax for premiums which were refunded to policyholders upon cancelled policies, the court held that such premiums were not part of the gross premiums for business done. The Court stated on p. 11:

> "It may be asked why did the statute say gross premiums? Unless it means all premiums received, whether refunded or not, we think the use of the word 'gross' was intended to include all premiums that remained in the treasury of the company, and to exclude any deductions for the commissions of agents or the expense of business. The gross amount collected from cancelled policies means a gross amount collected and retained by the company. The amount paid back is not collected for business done * * * There is no dispute as to the meaning of the word *gross*, and it is conceded that it means a whole or entire amount of premiums received for business done in this state during the year. The word *gross* is opposed to *net* and its ordinary meaning is the entire amount of receipts of the business, while the net receipts are those remaining after deduction for expenses and charges of conducting the business."

[fol. 162] From the reasoning in this case, it can be said that the amount paid an agent is part of the ordinary conduct of the business, and is therefore normally chargeable against the gross premiums received. The expense of putting the names of persons on the books of the company comes under the same definition. The expense of investi-

gating applicants falls within this category. The mere fact that the company maintains a travel bureau which does not appear to be a requirement under the contracted insurance or the application for membership, is merely in the nature of advertising the company and is a proper charge to the general maintenance of the company's business. As a result, regardless of the fact what they call this portion of the money received from the applicant, it goes into the fund for the general maintenance of the company in carrying on the business of insurance, and could therefore be properly termed in fact a part of the premium.

Upon reading the case of *Kreifels v. State Farm Mutual Automobile Insurance Company*, 62 N. Dak. 667, wherein the plaintiff claimed to be insured by the defendant against injuries to an automobile by reason of collision, the policy of insurance was issued by this same company, a membership fee was paid and insurance premiums paid as required by the company, but the renewal premium had not been paid at the time loss occurred, and the plaintiff sought to sustain the view that the membership fee was in the nature of a deposit and would pay the premium as extended insurance. The court refused to accept this view, and held against plaintiff. On page 671 it is stated in the opinion "the membership fee has no bearing upon the insurance premium," and this language is not used in the holding of the court in connection with the actual determination of the point involved in this case, but in the North Dakota case it was evidently contended by the company, and the court in discussing the case, stated:

> "Each member is required to pay his share of the losses and expenses as billed by the company to restrict his premium deposit for the purpose of renewal, and when losses are deducted from the deposit, the member is notified of the amount necessary to keep up the premium deposit to the amount required."

As a result of the fact that a different membership fee is required for each class of insurance that might be written in the same policy, it would seem that the real purpose of the membership fee is not to entitle the party to become a member of the company, but is to pay a part of the burden of carrying the particular insurance risk involved. Whether it is contended that the membership fee is to pay the ex-

penses as set forth above and presented to the Commissioner at the hearing, or whether it is, as contended in the North Dakota case, a premium deposit, makes very little difference in my opinion. If it is a premium deposit and not returnable to the insured, then it becomes a part of the funds of the company to be used by them for whatsoever purposes they may determine in the carrying on of the company's business, and this was so held in the case of *Manufacturers Mutual Fire Insurance Company v. Commonwealth*, 41 Pa. Co. 105.

It is true that all taxation statutes are construed strictly, [fol. 163] and in favor of the taxpayer, yet a taxpayer cannot, by dividing up the things sought to be taxed, and calling a portion of that thing by another name, evade taxation thereon, and although this company has been operating on this plan for a number of years, it would not seem that it was any deliberate attempt to evade the premium tax, as the statute was not enacted until 1927 and the company has operated under the present plan since its organization and since its admission to do business in the State of Kansas.

To hold the membership fee taxable under our statute would require a broad construction of the tax statute. The rule of this state and other states, is that tax statutes should be strictly construed and in favor of the taxpayer. The company exacts the membership fee but once. Thereafter so long as a member renews his policy by paying the amount designated as a premium each year, he may continue the policy in force subject to certain conditions not material here. If the membership fee was a premium this would make the total premium under the policy indefinite and dependent upon whether the insured in one case continued to pay his annual premiums for the same period as an insured in another case. Otherwise, one insured would pay a higher rate of premium than another. From this alone it can hardly be said that the membership fee is premium.

There is no question but what the membership fee is a part of the general income of the company and helps to support the general operations of the company and to carry on the general business of the company, and would be a proper item for taxation. The question is, has the legislature by the language used taxed it? The Kansas court

has held that premium has a specific meaning in the insurance business, 70 N. E. 15 and 61 C. J. 311, and is that consideration paid for the risk insured. Under the plan of operation of this company, it can hardly be said that the membership fee is any payment for the risk insured, because it is not required any time after the initial payment no matter how long the policy might remain in effect by paying what is termed by the company, a premium in addition to the membership fee.

As a result it is the opinion of this office that a membership fee charged by the company is not subject to the gross premium tax because of the requirements of the strict construction of the tax statute, and because of the plan and operation of the company.

Very truly yours,—— ——, Attorney General.

CHM:MH

[fol. 164] INSURANCE DEPARTMENT—STATE OF MISSISSIPPI,
JACKSON

John S. Williams, 3rd,
Commissioner.

February 25, 1938.

State Farm Mutual Automobile Insurance Company,
Bloomington, Illinois.

GENTLEMEN:

I have just had a conference with your attorney Mr. Matthias, and am giving you the following information at his suggestion.

Under the present Privilege Tax Laws of Mississippi, the membership fees collected by your Company are not subject to premium tax as they are not considered premium payments.

Very truly yours, (Signed) John Sharp Williams, 3rd, Commissioner of Insurance.

JSW:d

STATE OF NORTH DAKOTA,

OFFICE OF ATTORNEY GENERAL,

BISMARCK

April 19, 1938.

Mr. M. R. Prenner, Actuary State Department of Insurance, Bismarck, N. Dak.

DEAR MR. PRENNER:

I have your letter of March 7th in which you request our opinion as to whether membership fees collected by the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois are subject to tax under our statute, Section 4924 of the 1925 Supplement, providing for gross premium tax:

I have very carefully examined the policy form which you submitted with your letter, and after carefully considering the same have concluded that membership fees in this company are not taxable as premiums under our law. In the first place, this membership is payable only once and is by the terms of the policy excluded from consideration paid for the insurance. It is true that every applicant for the insurance in this company must first become a member of the company but the fact that he has paid his membership does not give him one day's protection. He must pay the regular premium rates fixed for various types of coverage, and that premium only is the consideration for his policy. Furthermore, this membership fee once paid is never returned to the insurer on the termination of his insurance policy. Any unearned portion of the premium must be returned.

[fol. 165] Our Supreme Court in the case of Kreifels v. The State Farm Mutual Automobile Company of Bloomington, Illinois, 62 N. D., 667, 244 N. W., 880, has held that this membership fee cannot be applied as payment of insurance or for the purpose of extending the insurance after the period for which premium was paid has expired. The court in that case says:

> "A membership fee for the right to secure insurance and for the benefits as a member of the company is required but it is no part of the premium for insurance."

Again the court says:

> "The membership fee is never returned to the policyholder and has nothing to do with the premium * * * *"

It may be argued that the company derived some benefit from the payment of these membership fees. That may be true in a sense but under the terms of the policy such benefit as might be derived cannot be held to be a consideration for the insurance. Especially is this true when we consider these facts in the light of the decision of our own court cited above.

Tax statutes are considered penal in their nature and must, therefore, be strictly construed.

We are, therefore, of the opinion that the fees paid for membership in the company are not taxable as part of the premium under Section 4924 of the 1925 Supplement, which provides for a gross premium tax.

Very respectfully submitted, (Signed) Al C. Strutz, Attorney General.

AC'S:RGM.

November 6, 1939.

Honorable Edgar B. Sims, Auditor and ex-officio, Insurance Commissioner, Charleston, West Virginia.

Dear Sir:

I am in receipt of your letter of October 18, 1939, which is in part as follows:

> "We are having some difficulty in determining the amount of taxes due the state from certain mutual automobile insurance companies for the reason that said companies charge a given premium but, before permitting the car owner to have insurance, require him to pay a large membership fee for each kind of coverage wanted by the car owner. For example, if the applicant desires fire, theft, collision, property [fol. 166] damage and bodily injury liability insurance on his car, he must pay the company a $5.00 joining fee for each of the coverages for which he applied. The payment of this joining fee for each type of coverage obtained assumedly provides for life membership

and entitles the car owner to purchase insurance in subsequent years without any additional membership fee. The premium paid, of course, varies with the experience of the companies and is in addition to the membership fees. The companies report to us that these membership fees are used to defray acquisition costs. If a policyholder surrenders or ceases to insure with the particular company, as a rule, the membership fee is forfeited.

"Now, what we want to know is, is that membership fee a part of the premium in fact exacted from the public and should it be taxed in calculating the 2% tax due the state? This office holds that these membership fees are part of the premium because the purchaser cannot secure insurance without paying such fees and is part of the price exacted and named in the policy. We feel that it is just as much a part of the premium paid as the agent's commission is a part of the premium collected by other companies."

The gross premium tax to which you refer is found in Code 1931, Chapter 33, Article 2, Sections 37 and 39, which, respectively, are as follows:

"Every insurance company or association incorporated by or organized under the laws of any other state and licensed to transact business in this State shall return annually, on or before the first day of March, to the insurance commissioner, under the oath of its president or secretary, a statement of the *gross amount of premiums* collected and received by it for the previous calendar year of business done in this State; and, upon receiving from the commissioner a certificate of the acceptance of such return and of the amount of tax due thereon, such company shall pay such tax to the insurance commissioner annually on or before the first day of March. The insurance commissioner may, if he deems best, require from every such company a bond, with surety, for the payment of such tax" (Italics ours).

"The annual tax which an insurance company or association is required to pay under the provisions of the two preceding sections shall be a sum equal to two per cent of the *gross premiums received by it* on the

business written or renewed in this state, less premiums returnable for cancellation, and including any so-called dividends on participating life insurance policies actually applied in reduction of premiums. All such taxes paid to the commissioner shall be paid to him into the state treasury for the benefit of the state fund" (Italics ours).

The sole question thus involved is whether a membership fee was intended to be included within the term "gross premium", in computing the two per cent tax imposed by law upon insurance companies.

In the absence of a Supreme Court decision in this state, [fol. 167] it would seem advisable to refer to general law and decisions of the highest courts of other states having similar or like statutory provisions respecting the taxing of gross premiums of insurance companies. While a definition of the word premium is not conclusive in the determination of this question, it is at least interesting to note that a premium is generally considered to be a consideration for insurance. 2 Bouvier's Law Dictionary, Unabridged, 3rd Revision, page 2669; 32 C. J. 1192; 14 R. C. L. 957; 11 Amer. & Eng. Ency. of Law, page 304. Generally the courts have not attempted to give to the meaning of the word "premium" a broader conception than the above definitions; however, we do find that the case of Daniel v. Life Ins. Co. of Virginia, Tex. Civ. App. 102 S. W. (2d) 256, at page 259 states that a premium is the consideration paid, whether in money or otherwise, for the contract of insurance. That the premium may take any of various nominal forms, as that of initiation fee, an administration fee, an assessment, or a stipulated single or periodic payment, according to the nature of the insurance.

Also, the case of Northwestern Life Association v. Stout, 32 Ill. App. 31, at page 38, goes so far as to state that the word "premium", as used in the law relating to the business of insurance, regardless of the name by which it is called, includes everything involving consideration for an insurance policy. However, in none of the above cases was the court directly considering the application of the right of a state to tax the membership fee as a part of the gross premium, but, by way of dictum, broadly defined "premium."

The only case we have been able to find directly in point is the very recent decision of the District Court of Appeal, First District, Division 2, California, decided February 21, 1939 (hearing denied by the Supreme Court of California April 20, 1939) styled State Farm Mut. Automobile Ins. Co. v. Carpenter, 87 Pac. (2d) 867, which is in part as follows:

> "The controversy rests on section 14 of article 13 of the Constitution and sections 900-909 of the Insurance Code, St. 1935, pp. 529-531, which takes the place of the Political Code sections in force at the time, but which are of the same purport and hence referred to for convenience. 'Every insurance company * * * shall annually pay to the State a tax * * * upon the amount of the gross premium * * * received from its business done in this State * * * * * * The question thus arises whether the company may specify the income received from membership fees separately from the 'cash premiums received', and whether the former should be included in the 'gross premiums' and thus become subject to the constitutional tax.
>
> "* * *
>
> "'Are the membership fees here involved a part of the gross premiums of plaintiff within the meaning of California Constitution, Section 14, Article 13?
>
> "'There can be no question that in ordinary usage the word 'premium' in the law of insurance * * * means the amount paid to the company as consideration [fol. 168] for insurance" (32 C. J. p. 1192, Sec. 324; 14 Cal. Jur. p. 469, Sec. 42).
>
> "'* * *'
>
> "The statement in the memorandum that the membership fee is no part of the consideration for the insurance is fully supported by substantial evidence, and this would be conclusive upon this appeal even if findings had not been waived. Lucas v. City of Los Angeles, 10 Cal. (2d) 476, 75 p. 2d 599. It appears from the reporter's transcript without controversy or dispute that these membership fees are charged to all applicants for membership, that, though a membership entitles the holder to apply for insurance, it does not entitle him to receive it, and that the membership fees are not returnable if insurance is rejected. It appears equally

> that if the member elects to exercise his option he may purchase insurance upon payment of the required premium, but that if he does not so elect, and does not pay the specified 'premium' he receives no insurance protection."

Also see the case of Kreifels v. State Farm Mut. Automobile Ins. Co. (N. D.) 244 N. W. 880, at 881, which states:

> "The membership fee is never returned to the policyholder, and has nothing to do with the premium but gives him a right to obtain insurance and for every class of insurance he is required to take out an additional membership".

Some help can be realized also from reference to Chapter 33, Article 10 of the Code, which provides the qualifications and powers of automobile mutual insurance companies in this state, and especially to Section 4 thereof, which provides that an automobile mutual insurance company shall have "power to prescribe the qualifications and the manner and form of the admission and withdrawal of members; * * * and to make all further necessary provisions concerning the conduct of its business or affairs." Therefore, it might seem that as long as the very nature of this company is a mutual organization, and more akin to fraternal or group membership than the usual conception of insurance companies, the membership fee, if valid in law, a question which is not here considered, when treated as apparently is the situation here, is entirely separate and apart from the assessment or premium.

While it is true that Code, 33-10-14, defining what shall be considered as a "gross premium" upon automobile mutual insurance companies, as well as Code 33-2-37 and 39, above, do not clearly indicate the intention of the legislature with respect to membership fees, we are constrained to follow the general rule that a tax shall be strictly construed against the levying authorities, at least where, as here, the weight of authority appears to be opposed to allowing the tax.

Trusting this answers your inquiry in full, I am,

Yours very truly, (Signed) Clarence W. Meadows,
Attorney General.

CWM:EBS LES.

[fol. 169] W. B. Harrison, Insurance Commissioner

A. R. Wright, Deputy Commissioner

INSURANCE DEPARTMENT

State Capitol
Atlanta

March 26, 1938.

Mr. Russell H. Matthias, Attorney at Law, 1 LaSalle Street, Chicago, Illinois

DEAR MR. MATTHIAS:

This is in somewhat belated acknowledgment of your letter of March 21st, with which you enclosed a memorandum of indicated rates for various coverages on a New Ford Sedan compared with stock company conference rates which is for the purpose of comparison with mutual companies doing business in this state.

Your letter and the enclosure is in connection with the matter of membership fee collected from assureds in this state which has been the matter of an extended correspondence between the State Farm Mutual Automobile Insurance Company, of Bloomington, Illinois, and this Department.

On the occasion of your visit you left a file of opinions and decisions in other states touching the liability of the mentioned company for the payment of premium taxes on membership fees.

After a further review of this matter it is our opinion that there exists no premium tax liability on membership fees of the named company, and this letter may be accepted as authority in the circumstances.

Reciprocating your kind regards, believe me,

Sincerely yours, (Signed) A. R. Wright, Deputy Insurance Commissioner.

ARW/M.

[fol. 170]

EXHIBIT "C" TO AFFIDAVIT

Mutual Casualty Companies With Assets Over Five Million

Company	Assets (12/31/41)	Surplus to Policyholders	Ratio of Surplus to Assets
American Mutual Liability	47,908,092	9,049,071	18.8%
Employers Mutual (Des Moines)	5,044,889	1,100,000	21.3%
Employers Mutual (Wausau, Wis.)	27,661,283	5,750,480	20.7%
Factory Mutual	14,136,094	10,089,117	71.3%
Farm Bureau Mutual (Columbus)	8,467,344	2,694,196	31.8%
Hardware Mutual (Stevens Point)	15,948,357	3,664,079	22.9%
Interboro Mutual	5,168,599	2,066,386	39.9%
Liberty Mutual	90,222,300	17,703,627	19.6%
Lumbermans (Chicago)	45,363,288	6,000,000	13.2%
Michigan Mutual	9,899,324	2,567,883	25.9%
Pennsylvania Thresherman	5,921,371	1,400,315	23.6%
Security Mutual Casualty	9,171,971	4,426,779	48.2%
State Auto—Columbus	8,857,499	4,296,869	48.5%
State Farm	25,410,221	9,197,430	36.0%
Texas Employers	6,162,356	2,285,356	37.0%
Utica Mutual	15,002,269	4,276,108	28.5%

[fol. 171] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

ACTION INSTITUTED IN MAY, 1942

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT—Filed

June 21, 1943

The defendant herein by John E. Martin, Attorney General for the State of Wisconsin, and Harold H. Persons, Assistant Attorney General, as his attorneys, moved the court for summary judgment dismissing the plaintiff's complaint herein. The plaintiff by R. M. Rieser and H. H. Naujoks, its attorneys, and Ekern, Meyers & Matthias of counsel, opposed the motion.

Upon the whole record and the motion papers, and after listening to the arguments of counsel and examining their briefs, and the court being fully advised in the premises;

It Is Ordered:

1. That the motion for summary judgment dismissing the plaintiff's complaint be and hereby is granted.

2. That no motion costs are allowed.

3. Let judgment be entered accordingly.

Dated, June 21, 1943.

By the Court:

August C. Hoppman, Judge.

[fol. 172] MEMO.

It is the opinion of this court that the decision of our court in the case of Duel v. State Farm Mutual Automobile Insurance Company, reported in 240 Wis. 161, is decisive of the motion for summary judgment in this action.

[fol. 173] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the state of Wisconsin, Defendant

(Action III—Instituted May, 1942)

JUDGMENT—Filed July 3, 1943

The above entitled action having been heard before the Court, without a jury, on the defendant's motion for summary judgment, the plaintiff appearing by its attorneys, Rieser & Mathys, represented by R. M. Rieser, and Ekern & Meyers, represented by Herbert H. Naujoks, and the defendant appearing by its attorney, John E. Martin, Attorney General of Wisconsin, represented by James

Ward Rector, Deputy Attorney General and Harold H. Persons, Assistant Attorney General, and after considering the affidavits, records and documents attached to the motion of the plaintiff, the affidavits, records and documents submitted by the plaintiff in opposition thereto, and all of the records, files and proceedings herein and the arguments of counsel and briefs submitted, the Court having [fol. 174] filed a memorandum opinion and entered an order herein on the 21st day of June, 1943 granting the defendant's motion for summary judgment dismissing the plaintiff's complaint and directing the entry of judgment accordingly;

It is hereby adjudged:

1. That the plaintiff's complaint herein and this action be and the same hereby are dismissed.

2. That neither of the parties shall recover any costs of the other, except that the defendant shall recover of the plaintiff the sum of $——, unpaid clerk's fees (to be inserted by the Clerk herein if not paid by the plaintiff).

3. That the temporary injunction heretofore entered on the 19th day of May, 1942, is hereby vacated and set aside.

Dated July 3rd, 1943.

By the Court:

August C. Hoppmann, Circuit Judge.

Approved as to form prior to signature.

R. M. Rieser, Attorney for Plaintiff; H. H. Persons, Attorney for Defendant.

[fols. 175-176] In Circuit Court of Dane County

[Titles omitted]

Action Insituted in May, 1942

Action Instituted in April, 1943

Notice of Appeal—Filed July 20, 1943

Please take notice that State Farm Mutual Automobile Insurance Company, plaintiff above named, hereby appeals to the Supreme Court of the State of Wisconsin from the

whole of a Judgment entered in each of the above entitled actions on the 3rd day of July, 1943, a copy of each of such judgments being hereunto annexed marked exhibits A and B and made a part hereof.

Dated July 19, 1943.

R. M. Rieser, Herbert H. Naujoks, Plaintiff's Attorneys.

To John Martin, Attorney General, Harold H. Persons, Assistant Attorney General; Attorneys for the Defendant in each of said actions. Myrtle L. Hansen, Clerk of Circuit Court of Dane County, Wisconsin.

Service admitted this 20th day of July, 1943. Myrtle L. Hansen, Clerk.

Due service admitted this 20th day of July, 1943. John E. Martin, Attorney for Defendant.

[fol. 177] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the state of Wisconsin, Defendant

BILL OF COMPLAINT—Filed May 4, 1943

The State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, brings this, its Bill of Complaint, against Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and for cause of action complains and alleges that:

1. The plaintiff, State Farm Mutual Automobile Insurance Company, is and was during all of the times herein mentioned a mutual, non-profit automobile insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, and was and is a citizen and resident of said State with its chief office and principal

place of business in the City of Bloomington, County of McLean, State of Illinois.

2. The defendant, Morvin Duel, is now and since September 27, 1939, has been the duly appointed, qualified and acting Commissioner of Insurance of the State of Wisconsin, and is a citizen and resident of the State of Wisconsin, residing in the City of Madison, County of Dane and State of Wisconsin, and defendant's business office is located at the Wisconsin State Capitol, City of Madison, Dane County, State of Wisconsin.

[fol. 178] 3. During the year 1939 plaintiff made application to the Commissioner of Insurance of the State of Wisconsin in the manner and on the forms prescribed by said Commissioner for a license to do the various forms of automobile insurance business in the State of Wisconsin. After due investigation and consideration by the then Commissioner of Insurance, the said Commissioner being satisfied by such investigation that plaintiff had fully complied with all provisions of law applicable to it and that plaintiff's plan of operation, methods and practices in the conduct of its business and the character and value of its assets were and are such as to safeguard the interests of its policyholders and the people of the State of Wisconsin, made and entered a finding and order to this effect and thereupon issued to plaintiff on the 13th day of July, 1939, a license to transact all forms of automobile insurance business in the State of Wisconsin for the license period ending May 1, 1940. A copy of this license is hereto attached and made a part hereof and marked "Exhibit 1". That since said 13th day of July, 1939, plaintiff was and is qualified and entitled to transact business and hold property in the State of Wisconsin under and pursuant to the statutes of said state.

4. That plaintiff seasonably applied for a renewal of said license and for renewal of its agents' licenses for the period ending May 1, 1941, and plaintiff seasonably and duly paid all fees, taxes and charges in connection therewith, and fully and promptly complied with all applicable laws of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department so as to entitle plaintiff to a renewal of said licenses but notwithstanding, such application, compliance with law and payments, the said defendant,

as Commissioner of Insurance of Wisconsin, failed, contrary to law, to renew such licenses for plaintiff company and the agents at the time the original licenses expired. [fol. 179] That on or about the 18th day of May, 1940, the Commissioner of Insurance of Wisconsin, without having previously had any hearing and without opportunity for hearing, issued an order denying a renewal of license to plaintiff to do all forms of automobile insurance business in the State of Wisconsin for the license year ending May 1, 1941.

5. Thereupon this plaintiff commenced an action in the United States District Court for the Western District of Wisconsin to compel the said Commissioner of Insurance of Wisconsin to issue such license to plaintiff, agents' licenses to each of its agents, and to enjoin and restrain said Commissioner from interfering with plaintiff's business, agents and members pending the trial and disposition of said case. Said court action is now pending but is stayed because, pursuant to the provisions of Section 285.06, Wisconsin Statutes, and Section 266 of the Judicial Code, as amended, (Sec. 380, U. S. C. A. Title 28) the Commissioner of Insurance of Wisconsin commenced an action in the Circuit Court of Dane County, Wisconsin, to enforce said order of May 18, 1940, denying a renewal of license to plaintiff and an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 18, 1940, pending trial and ultimate disposition of said action and that such stay is still in full force and effect.

6. Thereafter on or before May 1, 1941, plaintiff seasonably and duly made application to the Commissioner of Insurance of the State of Wisconsin for a renewal of license to do the various forms of automobile insurance business in the State of Wisconsin for the period ending May 1, 1942, and for agents' licenses for agents of plaintiff in Wisconsin, and to that end complied with all conditions and requirements to entitle the plaintiff and its agents to licenses. On [fol. 180] or about the 24th day of April, 1941, defendant notified plaintiff that he would refuse to renew plaintiff's license for the year ending May 1, 1942, and on or about the 5th day of May, 1941, the Commissioner of Insurance of Wisconsin issued a written order denying a renewal of

license to the plaintiff for the license year ending May 1, 1942. Said order and decision of May 5, 1941, was received by plaintiff on May 6, 1941.

7. Thereupon said plaintiff commenced another action in the United States District Court for the Western District of Wisconsin to compel the said Commissioner of Insurance of Wisconsin to issue such license to plaintiff for the period ending May 1, 1942, and for agents' licenses for agents of plaintiff, and to enjoin and restrain said defendant Commissioner from interfering with plaintiff's business, agents and members pending the trial and disposition of said case.

8. Said proceeding is now pending in the United States District Court for the Western District of Wisconsin but is stayed because, pursuant to the provisions of Section 285.06, Wisconsin Statutes, and Section 266 of the Judicial Code, (Sec. 380, U. S. C. A. Title 28) the Commissioner of Insurance of Wisconsin commenced an action in the Circuit Court of Dane County, Wisconsin, to enforce said order of May 5, 1941, denying a renewal of license to plaintiff and an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 5, 1941, pending the trial and ultimate disposition of said action and that such stay is still in full force and effect.

9. Thereafter, the above two actions brought by the Commissioner of Insurance of Wisconsin to enforce his orders denying a renewal of license to the Company in the Circuit Court for Dane County, Wisconsin, were consoli- [fol. 181] dated and heard as one before Honorable Arold F. Murphy, Circuit Judge, who entered an order on July 8, 1941, overruling the demurrers interposed by plaintiff State Farm Mutual Automobile Insurance Company to the original complaints of the Commissioner of Insurance in the suits filed in the Circuit Court for Dane County, Wisconsin, with leave to file an answer within twenty days. The plaintiff, State Farm Mutual Automobile Insurance Company, appealed these orders overruling demurrers to the Supreme Court of the State of Wisconsin.

10. The said Supreme Court of the State of Wisconsin, on January 13, 1942, (240 Wis. 161, 1 N. W. (2d) 887) made and entered its opinion and decision on demurrer, and solely on the basis of allegations in the complaint, and not

on the merits, holding that the use of the life membership plan of the plaintiff company was not permissible under the Wisconsin Statutes and affirmed the said orders of the Circuit Court for Dane County, Wisconsin. Thereafter, plaintiff State Farm Mutual Automobile Insurance Company made a motion for rehearing of the decision of January 13, 1942, and on March 13, 1942, the said Wisconsin Supreme Court made and entered its decision and order denying the said motion for rehearing.

11. In its opinion of March 13, 1942, (2 N. W. (2d) 871), on motion for rehearing, the Wisconsin Supreme Court restated the basis for its decision in the above causes in the following language:

> "Some concern is expressed in defendant's brief upon rehearing whether the scope of the opinion is sufficiently circumscribed. While we are of the view that it is, we see no objection to reiterating that the decision is put upon the ground that defendant's plan violates the statutes because of its use of a membership fee as the consideration for a life privilege—a fee to which is allocated a portion of the expenses of furnishing insurance protection, which is treated as earned at once and against which unearned premium reserves cannot be set up as required by the statutes."

[fol. 182] On April 13, 1942, the plaintiff was notified that the remittitur in the aforesaid causes was on that day filed in the Circuit Court for Dane County, Wisconsin. Thereupon, plaintiff herein (the defendant in the above actions), on or about May 2, 1942, duly filed its answers therein joined issue therein.

12. Thereupon, on or about the 15th day of April, 1942, the plaintiff State Farm Mutual Automobile Insurance Company, in full compliance in every particular with the statutes of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department and with the construction of the Wisconsin Statutes relating to the rights of plaintiff and the power and duty of the defendant in the premises by the Wisconsin Supreme Court decisions of January 13, 1942, and March 13, 1942, made a new filing of rates and policy forms with the Commissioner of Insurance of the

St[illegible]e of Wisconsi[illegible] plaintiff
a[illegible] [illegible], 1942, the use of its
[illegible] in the State of Wisconsin, and plain-
[illegible] the 27th day of April, 1942, adopted and
[illegible] in Wisconsin a new policy and rates based on
[illegible]el premium plan for both new and renewal rates. A copy of such schedule of rates and such policy as now in use are hereto attached and made a part hereof and marked "Exhibit 2". On and before May 1, 1942, and ever since, plaintiff's plan of operation and its methods and practices in the conduct of its business are, in every particular, in full compliance with all provisions of the Wisconsin Statutes, and more particularly, in full compliance with all provisions of the Wisconsin Insurance Laws and the applicable rules and regulations of the Wisconsin Insurance Department, and plaintiff's methods and practices in the conduct of its business and the character and value of plaintiff's assets are such as to safeguard the interests of its policyholders [fol. 183] and the people of the State. The plaintiff on April 15, 1942, renewed its request for a renewal of its license to do an automobile insurance business in Wisconsin on the level premium plan for the license period ending April 30, 1943. The level premium plan now used by the plaintiff in Wisconsin is the plan used by most of the automobile insurance companies in the State of Wisconsin and said level premium plan is approved by the defendant for use in Wisconsin.

13. On and before March 1, 1942, and ever since, plaintiff complied fully in every particular with all of the provisions of the laws of Wisconsin, and the rules and regulations of the Commissioner of Insurance of Wisconsin applicable to plaintiff, so as to entitle plaintiff to a renewal of plaintiff's license to do all forms of automobile insurance business in Wisconsin and for the renewal of its agents' licenses and the appointment of new agents for the license period ending April 30, 1943, and plaintiff has paid all required and lawful fees, charges, and taxes due to the State of Wisconsin as a condition for doing business in Wisconsin for the renewal of plaintiff's license and that of its agents for the period ending April 30, 1943, yet notwithstanding the foregoing defendant arbitrarily, capriciously, wilfully, and wrongfully refused to renew such license.

14. After the arbitrary and capricious refusal of defendant to issue a renewal of license to plaintiff for the license period ending April 30, 1943, said plaintiff commenced an action in the United States District Court for the Western District of Wisconsin to compel the said defendant, as Commissioner of Insurance of Wisconsin, to issue such a renewal of license to plaintiff and to enjoin and restrain said defendants from interfering with plaintiff's business, agents and members, pending the trial and disposition of such suit. Said suit is now pending in said court and the temporary restraining order issued therein [fol. 184] is in full force and effect but the proceedings therein are held in abeyance because at a hearing on defendant's motion to dismiss plaintiff's bill of complaint in said Federal Court, it was agreed by counsel, at the said Court's suggestion and with the said Federal Court's approval, that an action be commenced in the Circuit Court for Dane County, Wisconsin, in order to obtain a ruling on the disputed issue by the highest state court. The foregoing procedure was agreed upon because of the contention by counsel for defendant that the issues raised by plaintiff's action to compel defendant to issue a renewal of license to plaintiff involved a construction of the powers and duties of defendant under Wisconsin Statutes, which, it was argued by defendant's counsel, had not been completely applied nor construed by the Wisconsin Supreme Court in its opinions of January 13, 1942 (240 Wis. 161, 1 N. W. (2d) 887), and March 13, 1942, (2 N. W. (2d) 871), and that hence an authoritative determination by the Wisconsin Supreme Court should be had rather than by a Federal Court.

15. After commencement of the action in this court in May, 1942, to enjoin the defendant, Morvin Duel, as Commissioner of Insurance of the State of Wisconsin, from interfering with the plaintiff's business, agents or members pending the determination of the plaintiff's right to renewal of license for the license year ending April 30, 1943, the defendant filed its answer to said complaint and further filed a motion for summary judgment, which motion has been argued, briefs have been submitted and it is now under advisement by Honorable August C. Hoppmann, Circuit Judge, Dane County, Wisconsin.

16. Prior to the commencement of this action, and ever since, plaintiff complied fully in every particular with all [fol. 185] of the provisions of the laws of the State of Wisconsin and with the rules and regulations of the Commissioner of Insurance of Wisconsin applicable to plaintiff, so as to entitle plaintiff to a renewal of plaintiff's license to do all forms of automobile insurance business in the State of Wisconsin and a renewal of plaintiff's agents' licenses and the appointment of new agents for the license period ending April 30, 1944, and plaintiff has paid all required and lawful fees, charges and taxes due to the State of Wisconsin as a condition for doing business in Wisconsin and for the renewal of plaintiff's license and that of its agents for the license year ending April 30, 1944, and plaintiff has complied fully with all of its contracts and agreements made with its policyholders; yet notwithstanding the foregoing, the defendant Commissioner of Insurance of Wisconsin has arbitrarily, capriciously, wilfully and wrongfully refused to renew plaintiff's license for the license year ending April 30, 1944.

17. The plaintiff, State Farm Mutual Automobile Insurance Company, was organized under the laws of the State of Illinois, and commenced business on June 7, 1922. Thereafter it was licensed to do business and is now lawfully operating in the following states, districts and counties, and it was first licensed in the year shown: Illinois, 1922; Indiana, 1925; Missouri, 1925; South Dakota, 1925; Minnesota, 1926; Tennessee, 1925; Colorado, 1927; Iowa, 1927; Kansas, 1927; Kentucky, 1927; Michigan, 1927; Nebraska, 1927; California, 1928; Mississippi, 1928; Montana, 1928; Nevada, 1928; North Dakota, 1928; Texas, 1928; Utah, 1928; Washington, 1928; Arizona, 1929; Idaho, 1929; New Mexico, 1929; West Virginia, 1929; Wyoming, 1928; North Carolina, 1930 (Company later withdrew but in 1939 again applied for a license and was relicensed); Oklahoma, 1930; Oregon, 1930; Virginia, 1930; Arkansas, 1931; Alabama, 1932, Georgia, 1932; South Carolina, 1932; Delaware, 1933; Maryland, 1933; District of Columbia, 1934; Florida, [fol. 186] 1934; Louisiana, 1935; Pennsylvania, 1937; Dominion of Canada, 1938; Wisconsin, 1939; New Jersey, 1940. In every single state, district and country, except Wisconsin, the plaintiff has in the regular course annually received its renewal of license. Plaintiff has annually filed

in every said state, district and country its sworn financial statement, report or other required data with reference to the solvency, reserves, surplus, methods, plan, operation and financial condition of the plaintiff, which statements, reports or data have been received, examined, accepted and approved by all of the above Insurance Departments except Wisconsin, as being in full compliance with their laws, rules and regulations. In addition, the financial status and operations of the plaintiff have been regularly examined at intervals by and under the direction of the National Convention of Insurance Commissioners, and plaintiffs's methods and plan of operation, the amount of and character of its assets, its reserves, solvency and surplus have been all approved on each such examination as being adequate and in full and complete compliance in every particular and detail with all of the provisions of the applicable laws, rules and regulations of the states, district and country in which plaintiff so operates, as above set forth.

The license of the company has never been revoked or renewal thereof refused in any state, district or country, except as hereinbefore noted in Wisconsin.

18. The plaintiff company is in sound financial condition. Its annual sworn statement as of December 31, 1939, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $18,439,481.93; that its total liabilities as of that date were $13,175,205.12, which included the general or contingent reserve of $2,500,000.00. Its surplus over all liabilities as of that date, in addition to said contingent reserve of $2,500,000.00 was [fol. 187] $5,264,276.81. Its annual sworn statement as of December 31, 1940, copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $21,490,934.62; that its total liabilities as of that date were $15,598,704.67, which included the general or contingent reserve of $2,750,000.00. Its surplus over all liabilities as of that date, in addition to said contingent reserve of $2,750,000.00, was $5,892,229.95; plaintiff's annual sworn statement as of December 31, 1941, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $25,510,220.50; that plaintiff's total liabilities as of that date were $19,312,790.88, which included the general or contingent reserve of $3,-

000,000.00. Plaintiff's surplus over all liabilities as of December 31, 1941 (in addition to said contingent reserve of $3,000,000.00) was $6,197,429.62. Its sworn statement as of December 31, 1942, a copy of which is on file with the Commissioner of Insurance of Wisconsin, showed total admitted assets of $29,632,845.46; that its total liabilities as of that date were $20,637,863.07, which included a contingent reserve of $4,000,000.00. Plaintiff's surplus over all liabilities as of December 31, 1942, (in addition to said contingent reserve of $4,000,000.00), was $8,994,982.39.

As of January 1, 1940, the plaintiff State Farm Mutual Automobile Insurance Company was examined under the authority of the National Convention of Insurance Commissioners, of which the Wisconsin Insurance Department is a member, said examination covering the period from June 30, 1936, to and including December 31, 1939. The following states, acting for said National Convention of Insurance Commissioners, participated in said examination: Illinois, Arizona, Oklahoma and Kentucky; a copy of said report of examination is on file with the Insurance Commissioner of Wisconsin. As of December 31, 1939, said examination showed that the plaintiff company had total admitted assets of $19,152,455.05; that its total liabilities, including a [fol. 188] general or contingency reserve of $2,500,000.00 were $12,871,235.77, and its net surplus over and above all liabilities as of that date, in addition to said contingent reserve of $2,500,000.00 was $6,281,219.28.

The surplus as shown by the examiners was in excess of the surplus as claimed by the company in the amount of $1,016,942.47. The increased surplus as shown by the examiners is due to the fact that they assigned values to certain assets of the plaintiff company greater than claimed by the company in its annual statement and they found and considered certain liabilities of the company to be less in amount than stated by the company in its annual statement.

It is the policy and practice of the National Convention of Insurance Commissioners in all cases of examination of foreign insurance companies to assign examiners from different states to make examinations of different companies, and to do so under general rules and regulations acceptable to such Convention and to the states who are members of such Convention. Thereby expense and time is saved to such states in obtaining frequent examinations and in keeping records of examination up to date. Generally each

periodic examination of licensed insurance companies, of which that described herein was one, is made by examiners representing a different group of states than that represented in the preceding and following examination. By this method the following states have from time to time participated in the examination of the plaintiff, viz:

Examination as of States Participating

December 31, 1927, Illinois, Minnesota, Kansas, Missouri, Texas, South Dakota and Indiana.

July 31, 1929, Illinois, Minnesota and South Dakota.

January 30, 1931, Illinois, Kansas, Nebraska, Washington, Texas and West Virginia.

June 30, 1933, Illinois, Missouri, Minnesota, Oklahoma and Virginia.

June 30, 1936, Illinois, Texas, Alabama, Indiana, Pennsylvania and Louisiana.

[fol. 189] December 31, 1939, Illinois, Arizona, Oklahoma and Kentucky.

In addition incident to licensing the plaintiff for the first time, some states have made independent examinations. That such Convention examinations and the conclusions and recommendations of the examiners representing such states have been submitted to all states in which the plaintiff is now licensed and does business and have been accepted by such states as true and correct.

The present contingent reserve in the amount of $4,000,000.00 above referred to was created and exists for any and all possible liabilities of the company of any nature whatsoever over and above the reserves already existing and for any contingencies of any kind that may in any manner affect the company or its policyholders.

The surplus in the amount of $8,994,982.39 likewise is all available for the above purposes.

19. Plaintiff alleges upon information and belief that, at a hearing upon defendant's motion to dismiss plaintiff's complaint in the suit commenced by plaintiff in the United States District Court for the Western District of Wisconsin, counsel for defendant, in open court, stated that defendant's refusal to renew plaintiff's license was based upon the fact that the company operates upon the so-called life membership fee plan in certain other states, district and country.

Plaintiff further alleges that in those states wherein plaintiff operates upon the life membership plan, such plan is in full compliance with all provisions of the law and applicable rules and regulations thereunder in such states. In the states wherein plaintiff operates on a level premium plan, such states other than Wisconsin have not objected and do not object to plaintiff's use of the life membership fee plan in the states wherein plaintiff uses such life membership fee plan.

[fol. 190] The life membership fee plan under which the plaintiff company does all of its business except in Texas, Louisiana and Wisconsin, where the company does business on the level premium plan, and Arizona where the company does business on the unlevel or so-called staggered premium plan, is as follows:

Each applicant for automobile insurance is required to pay a separate membership fee for each general class or kind of automobile insurance which he desires to purchase. The membership fee does not purchase insurance and is no part of the premium for insurance. The membership fee varies by insurance coverage and territory. The membership fee on an automobile risk for any given coverage, once paid, is never required to be paid again even though the applicant changes cars or lapses his insurance for a time and later reinstates the insurance. The contractual agreement between the defendant company and the policyholder as respects membership fees is as set out in the insurance policy used in such other states, and reads as follows:

> "The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for the coverages for which said fees were paid so long as this company continues to write such coverages and the insured remains a desirable risk."

This policy provision is contained in all policies pursuant to Section 1 of Article VII of the by-laws of the corporation, which reads as follows:

> "Membership fees for the different kinds of insurance transacted by the corporation may be fixed in such amounts and upon such conditions as ordered by the Board of Directors and set out in the policy."

The purpose of the membership fee is to defray the expense of securing the new member and the expenses of inspection and determining whether the applicant is eligible to belong to a selected, safety-conscious group of automobile owners entitled to purchase and renew automobile insurance in the company at a minimum cost.

[fol. 191] Under this plan each applicant as a condition of admission to membership, himself bears the cost of establishing his eligibility to insure in the company. This relieves the existing policyholders of this cost and thus reduces their expense of insurance. Each new applicant, as he comes into the company, pays his own admission cost or expense as fixed by the company and such membership fee is earned at once by the company and is not returnable. Such life membership plan has been continuously used since the organization of the company.

The premiums, which vary as to coverage, type of car and territory where located, are collected separate from and in addition to the membership fees applicable. The first premium paid provides insurance for an original term of six months and the insurance may be automatically renewed for such successive periods of six months each as the required renewal premium is paid by the insured on or before the expiration of the then current term of insurance. The premium for each six-month term of insurance is and always has been entirely earned at the end of each six-month term. The rate of premium is based on the underwriting experience of the company for the various coverages, type of automobile, and territories, and is fixed by the Board of Directors of the company. Under the life membership plan the company does not make regular periodical payment of dividends to its policyholders, but accomplishes a saving to the policyholders by limiting its renewal premiums to the approximate net cost of providing insurance protection.

The premium charged by the company under its plan of operation are 20% to 35% less than the so-called conference rates, depending on the particular class of insurance carried. This lower cost of insurance is due to several factors:

(1) Plaintiff confines its risks to private passenger automobiles and the less hazardous forms of commercial cars

[fol. 192] and selects its risks carefully which results in a more favorable loss ratio*n* than enjoyed by most companies.

(2) All policies are issued in the home office of the plaintiff company, which relieves the agents of this work and enables the plaintiff company to operate at a lower compensation cost to its agents, thereby reducing the company expense of doing business. Policies are not reissued upon renewal of the insurance, as is done by most companies, which further reduces the company expense of doing business.

(3) It collects its renewal premiums by mail direct from the policyholders, which relieve the agents of this work and enables the company to operate at a lower compensation cost to its agents, thereby reducing the company expense of doing business.

(4) By collecting premiums direct from policyholders it escapes loss through bad accounts with agents suffered by many other companies where the agents collect premiums direct from the policyholders. By this means the company also escapes the cost which most companies have of maintaining accounts current with its agent.

(5) By reason of the fact that the premiums are collected in cash direct from the policyholder, the company is relieved of the expense of maintaining special agents in the field to verify accounts with agents and collect overdue premiums from agents.

The membership fee plan now being used by plaintiff in all states except Wisconsin, Louisiana, Arizona and Texas, has been and is recognized as valid and in full compliance with all of the provisions of the applicable laws of such states, and with the applicable rules and regulations of the Insurance Departments of such other states, and the plaintiff has complied in every particular with all reserve and other financial and other requirements of such other states and of the applicable laws therein, and all of the business done by plaintiff in such other states and plaintiff's operations and practices are in full compliance with all of the laws of the states in which plaintiff operates. In each state [fol. 193] where used the membership fee and the policy contract in respect thereto is accepted and recognized as lawful, and by the terms of the membership contract, n.em-

bership fees are held not to be a part of any premium; no reserve is required and no liability other than expressed in the membership contract exists either for reserves, refunds or otherwise. In accordance with the terms of the membership contract in each of said states the membership fees are "not returnable", and are fees as consideration "in addition to premiums". As such they reflect no liabilities for which reserves are required in such states. Plaintiff's method and plan of operation in such other states, as well as in Wisconsin, and the character and value of plaintiff's assets and reserves are in full compliance with law in such other states, as well as in Wisconsin, and are such as to safeguard the interests of plaintiff's policyholders and the people of the states in which plaintiff operates.

Prior to March 1, 1943, the plaintiff herein seasonably made application for a license for the license year ending April 30, 1944, and in connection therewith furnished all information and complied with all rules and regulations of the Department and with all laws of the State of Wisconsin as construed by the Wisconsin Supreme Court so as to be entitled to and was and is entitled to a license for the said period; that this proceeding is brought for the purpose of enforcing the rights of the plaintiff to a renewal of license for the license year expiring April 30, 1944, and for the purpose of protecting its business and business operations in the State of Wisconsin and to enable the plaintiff to obtain a determination of the issues presented by the defendant in his failure or refusal to grant a renewal of license to plaintiff company for the period ending April 30, 1944.

20. Notwithstanding that plaintiff has fully and promptly complied with all laws, rules and regulations lawfully applicable to plaintiff as aforesaid, and notwithstanding that [fol. 194] plaintiff's plan of operation and its methods and practices in the conduct of its business and the character and value of plaintiff's assets were and are such as to safeguard the interests of its policyholders and the people of the state and that plaintiff is wholly solvent and in a strong financial position, and notwithstanding that it was and is the plain, unequivocal, ministerial duty of the Commissioner of Insurance of Wisconsin to renew plaintiff's license to do business in Wisconsin as aforesaid for the

period ending April 30, 1944, and to renew plaintiff's agents' licenses and to permit appointment of new agents of plaintiff, said Commissioner of Insurance of Wisconsin arbitrarily, capriciously, unreasonably, and in violation of law, has refused to issue to plaintiff a license to do all forms of automobile insurance business in Wisconsin for the license year ending April 30, 1944.

21. Such unwarranted, capricious refusal to renew plaintiff's license and that of its agents for the period from May 1, 1943, to April 30, 1944, unless restrained, will do irreparable injury to plaintiff and to plaintiff's business, for which plaintiff has no adequate remedy at law except by this action in equity for an injunction herein. The action of defendant, unless enjoined, would completely destroy the going business and the good will of plaintiff, whereby plaintiff would suffer damages and loss greatly in excess of $25,000.00 and such injury to plaintiff's good will and reputation would make it difficult, if not impossible, for plaintiff to recover its business after defendant, as Commissioner of Insurance of Wisconsin, has been compelled to renew plaintiff's license and that of its agents at the end of the litigation.

22. Plaintiff further shows that it verily believes unless defendant is restrained by order of this court that the said defendant, as Commissioner of Insurance of Wisconsin, will invoke upon this plaintiff large, unjust and unreasonable losses and irreparable losses and damages, for which plaintiff has no other remedy at law that is just or [fol. 195] adequate and that the writ of injunction is the only writ that can save and preserve to plaintiff its rights until the matters in controversy are adjusted in a lawful and orderly manner and until defendant has been compelled to renew plaintiff's license for the license year ending April 30, 1944, at the end of this litigation. The plaintiff now has in force in the State of Wisconsin approximately 25,000 risks and plaintiff's annual premium income from such risks is in excess of $400,000.00 and plaintiff's business is rapidly growing. Plaintiff has established and now maintains in Wisconsin an administrative office and agencies and also a large sales force and staff with a loss adjustment bureau. Plaintiff now has in Wisconsin a force of approximately 500 agents, and plaintiff has invested, in

organizing and building up such establishment, in excess of $25,000.00.

23. Plaintiff shows that the defendant, as Commissioner of Insurance of Wisconsin, has only such powers and duties as are delegated to the office of the Commissioner of Insurance of Wisconsin pursuant to and by virtue of the statutes of the State of Wisconsin; and that defendant's order refusing to renew plaintiff's license to do all forms of automobile insurance business in the State of Wisconsin for the period from May 1, 1943, to April 30, 1944, was an- is wholly erroneous, arbitrary, capricious and without warrant in law and in violation of the positive ministerial duty imposed by state upon defendant.

24. Plaintiff further alleges that the arbitrary, imperious, capricious, and unlawful refusal of the defendant to issue a renewal of license to the plaintiff for the license year ending April 30, 1944, by reason of the facts set forth herein, deprives the plaintiff of its property without due process of law and denies the plaintiff the due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, and the similar provisions of the Constitution of Wisconsin, and imposes an arbitrary, unreasonable and unlawful interference with the plaintiff's right of contract in viola- [fol. 196] tion of Article I of the Fourteenth Amendment to the United States Constitution and impairs the obligations of contracts in violation of Section 10 of Article I of the United States Constitution.

25. Plaintiff further alleges that if the Statutes of Wisconsin are construed to permit the defendant, as Commissioner of Insurance, to exercise the broad powers said defendant claims, that is to refuse under Section 201.34, Wisconsin Statutes, to renew plaintiff's license for the license period ending April 30, 1944, said statute operates to impose an arbitrary and unreasonable interference with the right of contract in violation of Article I of the Fourteenth Amendment to the United States Constitution and impairs the obligations of contracts in violation of Section 10, Article I of the United States Constitution, and said statute as so construed denies to the plaintiff company the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

If the plaintiff were to be barred from the State of Wisconsin or were to withdraw therefrom with the issue open and undecided as to its right to a license and as to the power of the defendant to determine the legal effect of contracts in other states contrary to the decisions and determinations of courts and Commissioners of Insurance in such states, such action would cast a cloud upon all of its activities, would result in vast and irreparable damage, and would hamper and destroy its lawful business in Wisconsin and elsewhere. Such action would do vast and irreparable damage to the plaintiff in Wisconsin to the extent of destroying its sales and service organization, result in unnecessary cancellations of policies at vast and unnecessary expense to policyholders in the state. Not only would policyholders in this company suffer, but public interests would be damaged in that policyholders claimants, potential insurance buyers, agents in Wisconsin and elsewhere would likewise be injured and damaged. The uncertainty and cloud thus cast upon the plaintiff's business would be [fol. 197] a continuing and growing source of damage to the plaintiff and to the public as well.

Wherefore, the plaintiff respectfully prays that the said defendant, Morvin Duel, the Commissioner of Insurance of Wisconsin, his deputies, clerks, employees, agents, servants and attorneys, be permanently restrained and enjoined from interfering with the plaintiff's business, agents or members in the State of Wisconsin the conduct by the plaintiff of all forms of automobile insurance business in said state and as incidental to the final judgment herein that the defendant be required to issue to plaintiff and its qualified agents such licenses as are required by the law and to which plaintiff and its qualified agents are entitled as set forth herein; that during the pendency of this suit a temporary injunction issue restraining said defendant, his deputies, clerks, employees, agents, servants and attorneys, and all other persons acting under his authority or by his direction, from interfering with the plaintiff's business, agents or members in the State of Wisconsin and the conduct of all forms of automobile insurance business in said state; that pending the issuance of a temporary injunction a temporary restraining order issue enjoining and restraining the defendant, his deputies, clerks, employees, agents, servants and attorneys and all other persons acting under defendant's authority or by his direction, from interfering

with the plaintiff's business, agents or members in the State of Wisconsin in the conduct of all forms of automobile insurance business and that the plaintiff have such other further order, judgment and decree as may be equitable and proper in the premises and for the plaintiff's costs and disbursements in this action.

R. M. Rieser, One West Main St., Madison, Wisconsin; Herbert H. Naujoks, One North LaSalle St., Chicago, Illinois, Attorneys for the defendant, State Farm Mutual Automobile Insurance Company.

Rieser & Mathys, Ekern, Meyers & Matthias, of Counsel.

[fols. 198-200] EXHIBIT I TO BILL OF COMPLAINT

State of Wisconsin

Department of Insurance

This is to Certify, that the State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, has complied with all the provisions of law, and is authorized to transact the business of —— (15) Automobile —— in the State until the first day of May 1940, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this 13th day of July, 1939.

—— ——, Commissioner of Insurance. (Seal.)

[fol. 201] *Duly sworn to by Adlai H. Rust. Jurat omitted in printing.*

[fol. 202] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT OF ADLAI H. RUST

ADLAI H. RUST, being first duly sworn, on oath deposes and says that he is one of the principal officers of the State Farm Mutual Automobile Insurance Company, plaintiff

above named, to-wit: the Executive Vice-President of said plaintiff; that he is familiar with the facts hereinafter set forth; that he makes this affidavit for and on behalf of said corporation, being duly authorized thereunto; that said affidavit is made in support of a motion for temporary restraining order and temporary injunction; that the application for a temporary restraining order and temporary injunction herein is made in connection with a civil action in equity filed in this court to restrain and enjoin Morvin Duel, Commissioner of Insurance of the State of Wisconsin, from interfering with the business of the plaintiff and, incident thereto, to determine the powers and duties of the defendant as such Commissioner and his duty, to issue a license to the plaintiff company for the licensing year ending April 30, 1944; that the Wisconsin Supreme Court on January 13, 1942, and March 13, 1942, made and entered decisions holding that the use of a life membership plan by the plaintiff company in Wisconsin was not permissible under the Wisconsin Statutes, and based its decisions upon its [fol. 203] construction of the Wisconsin Statutes to the effect that it was improper to split premiums and designate part of the premium as a membership fee or separate charge; this conclusion was based primarily upon the construction by the Court of the reserve requirements of the Wisconsin Statutes; that on April 13, 1942, notice of the filing in the Circuit Court of Dane County, Wisconsin, on that date of the remittitur in said Wisconsin case was received by plaintiff's attorneys and plaintiff thereupon on April 15, 1942, notified the said Morvin Duel, Commissioner of Insurance of the State of Wisconsin, that plaintiff would on and after April 27, 1942, abandon in Wisconsin the use of its life membership plan and that said plaintiff would, on and after said April 27, 1942, use in Wisconsin a level premium plan, both for new insurance and in renewal of existing policies; that on and after the said 27th day of April, 1942, plaintiff has abandoned the use of its life membership plan in Wisconsin and has operated in Wisconsin solely on the level premium plan as aforesaid.

That the company was legally licensed in Wisconsin on July 13, 1939, and its operations have been and are such as to safeguard the interests of its policyholders and the people of the State of Wisconsin; that the plaintiff has in all respects complied with the conditions laid down in the Wisconsin Supreme Court decisions on January 13, 1942, and

March 13, 1942; that the plaintiff company has spent large sums of money in building an agency plan and developing its business in Wisconsin, which will be totally and irreparably lost unless the defendant is enjoined and restrained pending final determination of the issues presented herein and as prayed for in the complaint herein; that the company is wholly solvent, with total admitted assets in excess of $29,000,000.00, and that it has surplus over all liabilities in excess of $8,900,000.00 in addition to a contingent reserve [fol. 204] of $4,000,000.00, and that the interests of more than 25,000 policyholders in Wisconsin are fully protected and will in nowise suffer by reason of the issuance of a temporary restraining order or temporary injunction, pending a final determination of the issues herein; that the State of Wisconsin has received all taxes, charges and fees lawfully owing, and that the revenues of the State of Wisconsin will not suffer by reason of the issuance of a restraining order or temporary injunction pending a final determination of the issues herein.

Adlai H. Rust.

Subscribed and sworn to before me this 27th day of April, 1943. C. G. Mathys, Notary Public, Dane County, Wis. My commission expires: January 5, 1947. (Seal.)

[fol. 205] In Circuit Court of Dane County

[Title omitted]

Order to Show Cause

Upon reading the verified complaint and the affidavit of Adlai H. Rust herein, and it appearing from the facts shown by said verified complaint and affidavit that before notice can be served and a hearing had on plaintiff's application for a temporary injunction herein, or on the plaintiff's application for a restraining order, immediate and irreparable injury, loss and damage will result to plaintiff, to-wit: Plaintiff's business and plant in the State of Wisconsin would be destroyed and become useless and all activities therein would be suspended and interrupted and its good will and reputation elsewhere would be damaged if defendant's failure or refusal to renew plaintiff's license

to do business in Wisconsin for the period ending April 30, 1944, is not restrained and enjoined, inasmuch as plaintiff would be unable to operate lawfully in Wisconsin without a license and no new policies could be solicited or secured by plaintiff through its local licensed agents, and as a result said agents of plaintiffs would leave the employment of plaintiff to solicit and secure automobile insurance policies for competitors of plaintiff and the policyholders now residing in Wisconsin would be unable to obtain any services in connection with their policies in this state and this, among other things, would cause said policyholders not to renew [fol. 206] their insurance with plaintiff company, and thus such threatened action of defendant would completely destroy the going business and good will of plaintiff in Wisconsin and such injury and destruction of plaintiff's good will, reputation and business in said State of Wisconsin would make it difficult, if not impossible, for plaintiff to retrieve its business if, upon final determination of this matter, it should be held that the defendant, as Commissioner of Insurance of Wisconsin, is required to renew plaintiff's license to do all forms of insurance business in Wisconsin for the license year ending April 30, 1944; and such injuries are irreparable because they cannot be compensated for in damages and may subject plaintiff to fines and forfeitures; and there is danger that such irreparable injuries are liable to occur, and are threatened by the failure or refusal of the defendant to renew plaintiff's license before a hearing upon notice can be had;

Now, Therefore, It Is Ordered that the defendant, as Commissioner of Insurance of Wisconsin, show cause before Branch No. 2 of this court at the Court House in Madison, Dane County, Wisconsin, on the 4th day of May, 1943 at 10 o'clock in the forenoon, why the defendant in his said capacity as Commissioner of Insurance, his deputies, clerks, employees, agents, and attorneys, should not be restrained and enjoined from interfering with plaintiff's business, agents or members in the State of Wisconsin, and the regular conduct of the business and affairs of plaintiff, and why pending the entry of final judgment herein the defendant should not permit the plaintiff and its agents and representatives to continue their business and operations as if the defendant had complied with the law and had issued a license to plaintiff and separate agent's licenses to the

individual qualified agents appointed by the defendant from time to time. Pending hearing upon this order to show cause and the entry of an order thereon, defendant is hereby [fol. 207] restrained and enjoined from interfering with plaintiff's business, agents, or members in the State of Wisconsin and from taking any steps to prevent the conduct of the plaintiff's business as heretofore.

This restraining order shall become effective upon the giving of security by the plaintiff by filing an undertaking in the sum of $1,000.00, conditioned upon the payment of such costs and damages as may be incurred or suffered by said defendant if if should be finally determined that said order was improperly issued or that may be awarded to defendant by reason of the granting of said order.

It Is Further Ordered that a copy of this order be served upon said defendant, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, within three days from the date of this order.

Issued and entered this 29th day of April, 1943.

August C. Hoppmann, Circuit Judge, Branch No. 2.

[fol. 208] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

UNDERTAKING ON TEMPORARY RESTRAINING ORDER

The undersigned hereby undertakes that the plaintiff above named, the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, shall pay to the defendant above named, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, such costs or damages as may be incurred or suffered by the said defendant, Morvin Duel, or that may be awarded to said defendant by reason of the granting of the order or orders hereinafter described, not to exceed the sum of One Thousand Dollars ($1,000.00), including all loss or damage which may result from the issuance of the temporary restraining order now pending or a temporary injunction to be issued after hearing by the court herein if such injunction shall be issued

within one year from the date hereof, if it should be finally determined that the said temporary restraining order or the temporary injunction was improperly issued.

Dated this 29th day of April 1943.

Fidelity and Deposit Company of Maryland (Seal.)
By Reid M. Bergh, Agent.

Approved as to form & amount. August C. Hoppmann,

[fol. 209] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

Due and personal service of the within Answer admitted this 25 day of May, 1943.

R. M. Rieser, one of the Attorneys for Plaintiff.

ANSWER (1943 LICENSE CASE NO. 4)—Filed June 3, 1943

Now comes the defendant, Morvin Duel, Commissioner of Insurance of the State of Wisconsin, and for answer to the complaint herein, admits, denies and alleges as follows:

1. Admits paragraphs 1, 2 and 3 of the complaint except the last sentence allegation of paragraph 3 and as to said allegation denies that since the 13th day of July, 1939, plaintiff was and is qualified and entitled to transact business or hold property in the State of Wisconsin under and pursuant to the statutes of said state, and in this connection alleges that the plaintiff was not on said date and was not at any time thereafter and is not now qualified and entitled to transact business or entitled to hold property in the state of Wisconsin under the statutes of said state.

2. Admits that the plaintiff seasonably applied for a renewal of said license and for renewal of its agents' licenses for the period ending May 1, 1941 and that plaintiff seasonably and duly paid all fees, taxes and charges in connection therewith. Denies that the plaintiff fully or promptly or otherwise complied with all applicable laws [fol. 210] of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department so as

to entitle the plaintiff to a renewal of its said licenses. Admits that the defendant, as Commissioner of Insurance, refused to renew such licenses for the plaintiff company and its agents at the time that the original licenses expired and alleges that at all times since the defendant has refused to renew same. Denies that said refusal is contrary to law. Denies that the Commissioner's action of May 18, 1940 was without opportunity for hearing and in this connection alleges that the plaintiff's position and contention with respect to hearing before the defendant Commissioner of Insurance in relation to the order of the Commissioner of May 18, 1940 and the order of the Commissioner of May 5, 1941 (which later order is referred to in paragraph 6 of the complaint) was that the plaintiff did not want any hearing before the Commissioner thereon.

Defendant alleges that the circumstances relating to the order of May 18, 1940 were that the defendant had the plaintiff's application under advisement but that the defendant as Commissioner of Insurance, had taken no official action with respect to plaintiff's application for renewal of its said license and those of its agents when, on May 11, the defendant received a letter from the Director of Insurance of the state of Illinois inquiring as to the status of the plaintiff company in the State of Wisconsin and suggesting to the defendant that said Director would like to receive notice of the defendant's proposed action in relation to the plaintiff's application for renewal of its license to do business in the state of Wisconsin in advance [fol. 211] of defendant's official action in respect thereto. That in response to said letter the defendant duly notified the Director of Insurance as to defendant's official action in respect to said application by a letter dated May 18, 1940 and by forwarding with said letter a copy of the defendant's findings and decision in said matter; that said findings and decision set forth in detail the various statutes with respect to which the plaintiff company's method and plan were at variance and not in compliance as well as why the plaintiff company's methods and practices in the conduct of its business were not such as to safeguard the interests of its policyholders and the people of the state; that at the same time notice of said decision and findings were transmitted to Ekern & Meyers at Chicago, attorneys for the plaintiff company, who had represented it in obtaining

the original license and in the application for renewal thereof. That in defendant's letter to the Director of Insurance of the state of Illinois the defendant stated that if he received a statement from the company that it was withdrawing from the state within ten days it would not be necessary for the defendant to serve the said findings and decision upon the company and have the matter acted upon by the courts; that before the ten days expired the plaintiff company, without notifying the defendant that it intended to do so and without applying for any rehearing commenced the action in the United States District Court for the Western District of Wisconsin, referred to in paragraph 5 of the bill of complaint. Alleges that in that said action and as an ex parte matter, the District Court of the United States issued a temporary restraining order pending a hearing upon the company's application for a temporary in- [fol. 212] junction; that the defendant was duly notified of the date for hearing upon said company's application for temporary injunction in the District Court, the said matter to be heard before a three-judge court convened pursuant to the provisions of sec. 266 of the Judicial Code as amended (28 U. S. C. A. Sec. 380).

3. Admits paragraph 5 except the allegation that "an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 18, 1940" and in this connection alleges that the Circuit Court for Dane County, Wisconsin issued a stay order which stayed any and all action brought by the Commissioner of Insurance to enforce against the plaintiff company the provisions of the Wisconsin Statutes relating to foreign insurance companies doing business in the state and to enforce the defendant's findings, determination and official action, pending the determination of the suit brought by the defendant Commissioner of Insurance to enforce same. Admits that said stay is still in full force and effect but denies that said stay was a stay of the effect of the defendant's order.

Defendant alleges that he was unable to bring his action, instituted in the Circuit Court for Dane County, on for trial and disposition prior to the expiration of the 1941 license year due to the plaintiff company's requesting adjournments or continuances from time to time, some of which the defendant, upon request, agreed to but the last one

of which the defendant opposed and that the continuance granted by the Court with respect thereto was over the defendant's objection thereto.

[fol. 213] 4. Admits the allegations of paragraph 6 except the allegation that plaintiff complied with all conditions and requirements to entitle it and its agents to licenses, and denies same.

5. Admits the allegations of paragraph 7 and alleges that the plaintiff company in its action in the Federal District Court aforesaid again pursued the same remedy in the Federal Court and obtained, as an ex parte matter, a temporary restraining order from said Court pending a hearing upon the company's application for a temporary injunction; that the defendant was again duly notified of the date of hearing upon the company's application for a temporary injunction, said matter to be heard before a three-judge court convened pursuant to the provisions of sec. 266 of the Judicial Code as amended (28 U.S.C.A. sec. 380).

6. Admits the allegations of paragraph 8 except the allegation that "an order was entered by the Circuit Court for Dane County, Wisconsin, staying the effect of defendant's order and decision of May 5, 1941" and in this connection alleges that the Circuit Court for Dane County, Wisconsin issued a stay order which stayed any and all action brought by the Commissioner of Insurance to enforce against the plaintiff company the provisions of the Wisconsin Statutes relating to foreign insurance companies doing business in the state and to enforce the defendant's findings, determination and official action, pending the determination of the suit brought by the defendant Commissioner of Insurance to enforce same. Admits that said stay is still in full force and effect but denies that said stay was a stay of the effect of the defendant's order.

[fol. 214] 7. Admits the allegations of paragraphs 9, 10 and 11 except the allegation in paragraph 10 that the demurrer was "not on the merits", denies said allegation and alleges that the demurrer fully presented the case upon its merits.

8. Admits that on or about the 15th day of April, 1942, the plaintiff company attempted to file new rates and policy

forms with the defendant and admits upon information and belief that as of April 27, 1942 the plaintiff company abandoned the use of its membership fee plan in the state of Wisconsin; admits upon information and belief that plaintiff on and after the 27th day of April, 1942 adopted and put in force in Wisconsin a new policy and rate plan based on the level premium plan for both new and renewal rates. Admits that Ex. 2, attached to the complaint, is a copy of the schedule of rates and policy form attempted to be filed with the defendant. Alleges that the plaintiff was informed at the time of the attempted filing that the defendant could not accept same; that plaintiff's unearned premium reserves were not and would not be by the proposed change, within the requirements of the Wisconsin Statutes and that such proposed filing was not in compliance with the Supreme Court decisions referred to in paragraph 12 of the complaint in that plaintiff's unearned premium reserves were not in compliance with the unearned premium reserve laws of the state of Wisconsin as construed by said Court in said decisions. Denies that said attempted filing or that the putting into operation of the new policy and rates above referred to was in full compliance with the statutes of Wisconsin and with all applicable rules and regulations of the Wisconsin Insurance Department or with the construction of the Wisconsin Statutes [fol. 215] in the Supreme Court opinions hereinbefore referred to and in this connection alleges that said attempted filing and the putting into force said policy and rates in the state of Wisconsin and the attempting of the plaintiff to do business thereunder was not in compliance with the said Supreme Court decisions but in defiance thereof and for the reason that the plaintiff's unearned premium reserves do not meet the requirements of the Wisconsin Statutes as those requirements were construed in said opinions. Denies that the plaintiff's methods and practices in the conduct of its business are such as to safeguard the interests of its policyholders and the people of the state. In this latter connection the defendant alleges that the plaintiff has always justified its life membership fee plan of writing insurance in that such plan gives the insured a valuable right to insure in the company pursuant to the terms of the policy provision set forth on page 12 of the complaint. Alleges that the plaintiff company claimed the

right to be valuable in that the insured had a contract right to purchase insurance with the plaintiff company once the membership fee was paid, at its reduced rates, which rates were reduced because of payment of the life membership fee. The plaintiff company in its attempted filings of April 15, 1942 and its subsequent putting into operation a new level premium plan in the state of Wisconsin constitutes a breach and a complete abandonment by the plaintiff of the obligation assumed by plaintiff in the policy contract clause, hereinbefore referred to, in respect to all policyholders who, since plaintiff commenced doing business in the state, have paid to the plaintiff life membership fees for the claimed valuable right referred to.

[fol. 216] Defendant alleges that plaintiff has collected from policy holders in the state of Wisconsin, while it was unlawfully writing insurance upon a life membership fee plan, $137,737.50 in membership fees up to January 1, 1942, all of which money lawfully and in equity and good conscience belongs to and should be returned to said insureds as the plaintiff company cannot lawfully perform its contract obligation with them and has, by the new schedule of rates, abandoned its contract obligation with its said insureds. The defendant alleges that even if plaintiff's unearned premium reserves did meet the requirements of Wisconsin Statutes he would refuse to license the plaintiff company until it has returned to its insureds the life membership fees extracted from them and with respect to which it cannot give anything in return.

Admits that plaintiff, on April 15, 1942, renewed its request for a renewal of its license to do an automobile insurance business in Wisconsin on the level premium plan for the license period ending April 30, 1943. Admits that the level premium plan or similar level premium plans now used by the plaintiff in Wisconsin are plans used by most of the automobile insurance companies in the state of Wisconsin and that level premium plans are approved by the defendant for use in Wisconsin.

9. Denies all allegations of paragraph 13 except those that plaintiff has paid all required and lawful fees, charges and taxes due the state of Wisconsin as a condition for doing business and admits same.

10. Admits the commencement by plaintiff of the action in the United States District Court for the Western District

of Wisconsin set forth in paragraph 14. Denies that de-
[fol. 217] fendant's refusal to issue the licenses was arbitrary or capricious. Admits the pendency of plaintiff's action commenced in the Federal District Court for the Western District of Wisconsin and that the ex parte temporary restraining order which plaintiff procured in said action was continued in full force and effect until such reasonable time as it would take plaintiff to commence an action in the Circuit Court for Dane County. Admits that such procedure was agreed upon at the suggestion of the judge of the Federal District Court for the Western District of Wisconsin but denies that it was the contention by counsel for defendant that the issues raised by plaintiff's action in said Federal District Court involved a construction of the powers and duties of the defendant which had not been completely applied or construed by the Wisconsin Supreme Court in the decisions referred to, and that hence an authoritative determination by the Wisconsin Supreme Court should be had rather than by a Federal Court, and in this connection alleges that the defendant took the position in the said Federal District Court that the decisions of the Wisconsin Supreme Court referred to had completely disposed of the issue which plaintiff sought to raise in said action in the Federal District Court and which plaintiff seeks to raise in the action commenced in the Circuit Court for Dane County, Wisconsin (1942 action) and had disposed of said issue contrary and adversely to the plaintiff's position in that action and that defendant considered there was such little merit to the plaintiff's position that he proposed to dispose of the matter by motion for summary judgment in the two prior actions which defendant instituted in the Circuit Court for Dane County and referred to in para-
[fol. 218] graphs 5 and 8 of the complaint herein, but that if the foregoing position were not true and there did remain any issue of law not settled by said decisions, then it would follow that the plaintiff in its action in the Federal District Court was asserting rights in said court under Wisconsin statutes which called for official action and under circumstances where that official's duty had not as yet been determined by the highest court of the state and that for a Federal Court to attempt to forecast that duty would be an abuse of discretion and reversible error under the doctrine of the federal cases cited and that in either event the com-

plaint set forth no cause of action with respect to which the Federal Court could or should proceed.

11. Admits the allegations of paragraph 15 of the complaint.

12. Denies all allegations of paragraph 16 except those that the plaintiff has paid all required and lawful fees, charges and taxes due the State of Wisconsin as a condition for doing business and admits the same.

13. Admits upon information and belief paragraph 17, except the allegation that the convention examination and reports found plaintiff's methods and plan of operation, the amount of and character of its assets, its reserves, solvency and surplus in full and complete compliance in every particular and detail with all the provisions of the applicable laws, rules and regulations of the states, district and country in which the plaintiffs operates and with respect to said allegation denies same and alleges that the convention examinations and reports do not purport to find or determine whether the plaintiff company or any other company operates in full and complete compliance in every particular and detail with all the provisions of the applicable laws of [fol. 219] the various states, districts or countries in which a company operates and does business.

14. Admits the allegations of paragraph 18 of the complaint except the allegations that the plaintiff company is in sound financial condition and that the Convention examinations and the conclusions and recommendations of the examiners have been accepted as true and correct by all states in which the plaintiff is new licensed and does business and with respect to said allegations denies the same, and in this connection alleges that said Convention examinations and the conclusions and recommendations of the examiners have not been accepted by the State of Wisconsin as determinative of compliance with the solvency requirements of the Wisconsin statutes and further alleges that the plaintiff's life membership fee plan and method of operation which it uses in 38 out of 42 states, districts and countries in which it does business is such as to make it impossible to determine the plaintiff's surplus after setting aside unearned premium reserves as required by Wisconsin law and such as to make it impossible to compute and set

aside the required statutory unearned premium reserves and such as to make it impossible for the plaintiff to meet the solvency requirements of the Wisconsin unearned premium reserve law.

15. Denies upon information and belief that counsel for defendant, upon defendant's motion to dismiss plaintiff's complaint in the Federal District Court, purported to make a comprehensive statement as to all of defendant's major objections and reasons for refusal to grant the plaintiff and its agents licenses and in this connection alleges that there are major objections to licensing the plaintiff and its agents, [fol. 220] all of which have been asserted by the defendant at various stages of these proceedings, are matters of record therein and fully and completely known to the plaintiff, in addition to those set forth herein and which defendant is not asserting at the present time because of his belief that there is no merit to the present action for reasons herein set forth.

Defendant further alleges upon information and belief that the statement in paragraph 19 of the complaint "counsel for the defendant in open court, stated that defendant's refusal to renew plaintiff's license was based upon the fact that the company operated upon the so-called life membership fee plan in certain other states, district and country" is not an accurate statement with respect to counsel's statement and alleges that it is not the position of the defendant with respect to defendant's objection to plaintiff's life membership fee plan of operation used by the plaintiff in 38 out of the 42 states, districts and countries in which it does business and in this connection alleges that the defendant's objection to the life membership fee plan used in such states is not grounded upon the fact that the plaintiff uses such plan in said states or upon any question as to whether said plan is lawful or unlawful in said states, but that the plan itself, as used in said states is such as to make it impossible for plaintiff to comply with the unearned premium reserve laws and the solvency requirements in relation thereto with respect to foreign mutuals doing business in this state.

Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the second full sub-paragraph of paragraph 19 of the complaint, but [fol. 221] for purposes of this answer admits same. Admits that the plaintiff's life membership fee plan and its method of operation thereunder in all states except Texas,

Louisiana, Arizona and Wisconsin, since April 27, 1942, are substantially as set forth in paragraph 19 of the complaint, but alleges that for all purposes of the Wisconsin Statutes the plaintiff's life membership fee is "premium" and as such is not earned at once and cannot be treated as earned at once, and alleges that when the plaintiff company does business on the life membership fee plan as it did in Wisconsin until April 27, 1942 and as it does in all states except as above noted, the plaintiff company forecloses any possibility of its maintaining the unearned premium reserves required by Wisconsin law and required of all insurance companies doing business in Wisconsin, foreign and domestic.

Admits that the contractual agreement between the company and its policyholders, as set forth in the policy with respect to life membership fees is as alleged in the complaint, paragraph 19, the second sub-paragraph on page 14 and that the by-law of the plaintiff company with respect to membership fees is as alleged in the complaint, paragraph 19, the third sub-paragraph on page 14 of the complaint. Defendant has no knowledge or information sufficient to form a belief as to whether the purpose of the membership fee is as set forth in paragraph 19 of the complaint, the last sub-paragraph on page 14, but for purposes of this pleading admits same. Admits that the plaintiff company treats the life membership fee as one which by the contract is earned at once and as one which is not returnable and in this connection alleges that such is the plaintiff company's practice in all states in which it operates and uses [fol. 222] the life membership fee plan and alleges that as a fee treated as earned at once the plaintiff company sets up no unearned premium reserves at all with respect to such life membership fee. Admits that the life membership fee plan has been continuously used by the plaintiff company since the organization thereof.

Defendant has no knowledge or information sufficient to form a belief as to the remaining allegations in the first sub-paragraph of paragraph 19 on page 15 of the complaint, but for purposes of this pleading admits same. Admits that the allegations contained in paragraph 19 the second sub-paragraph on page 15 correctly state the company's practices with respect to its plan and method of operation under the life membership fee plan.

Admits that the "premiums" charged by the plaintiff (premiums designated as such in the policy) under its life membership fee plan of operation, are from 20 to 35 per cent less than the so-called conference rates, depending upon the particular class of insurance carried. Admits that the several factors (denominated (1), (2), (3), (4), and (5),) in sub-paragraph 9 of paragraph 19 of the complaint, pages 15 and 16, are factors which the plaintiff uses in its system of writing insurance and that the method of writing insurance used by the plaintiff company is as set forth in said sub-paragraphs. Admits that said methods have economy advantages and in this connection alleges that such economy factors have both advantages and disadvantages. Admits that the plaintiff has extended and operates under the life membership fee plan in 38 states of the union and Canada; admits that said plan is not now used in Wisconsin, but alleges that it was used in Wisconsin continuously [fol. 223] until April 27, 1942 Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 contained in the last sub-paragraph starting at the bottom of page 16 and continuing on page 17 of the complaint and therefore neither admits nor denies same, but for purposes of this pleading admits that so far as known to defendant plaintiff's life membership fee plan and its methods and practices thereunder are in compliance with the laws of said states where it is permitted to use said plan, but in this connection alleges that such plan is one which may upon superficial analysis receive administrative approval as was the case when Commissioner Mortensen licensed the plaintiff company in 1939 but is one which is vulnerable when subjected to judicial scrutiny and attack as was the case in Wisconsin, and further alleges upon information and belief that the plan has been subjected to judicial scrutiny and attack in few, if any, of the states, districts or countries in which the plaintiff company does business. Denies that plaintiff's assets and reserves are in compliance with the laws of the state of Wisconsin or that they are such as to safeguard the interests of plaintiff's policyholders and the people of this state.

16. Defendant admits that prior to the first day of May 1943 the plaintiff seasonably made application for a license for the license year ending April 30, 1944 but denies that

the plaintiff complied with all rules and regulations of the department or with all laws of the state of Wisconsin as construed by the Wisconsin Supreme Court so as to be entitled to a license for said license period. The defendant admits that the plaintiff professes to bring this action for the purpose set forth in paragraph 19 of the [fol. 224] complaint, but in this connection alleges that the issue which plaintiff seeks to raise in the instant action has already been determined adversely to the plaintiff by the decisions of the Wisconsin Supreme Court, hereinbefore referred to, and that the plaintiff's action is wholly without merit.

17. Admits that the defendant refused to renew plaintiff's license to do business in Wisconsin for the period ending April 30, 1944, and to renew plaintiff's agents' licenses, but denies that said refusal was arbitrary, capricious or unreasonable. Denies that it was the ministerial duty of the defendant to issue any such licenses and in this connection, for reasons hereinbefore set forth, alleges that it was the plain duty of the defendant to refuse the renewal of such licenses.

18. Denies the allegations of paragraph 21 of said complaint and in this connection alleges that the plaintiff company has never lawfully conducted its business in Wisconsin and is not now doing so and that the plaintiff company never has been entitled to a license to do business in the state of Wisconsin and is not now entitled to such license or licenses.

19. Admits that the plaintiff now has in force in the State of Wisconsin approximately 25,000 risks and that plaintiff's annual premium income from such risks is in excess of $400,000 and rapidly growing; admits that plaintiff has established and now maintains in Wisconsin an administrative office and agencies and a large sales forces and staff with a loss adjustment bureau; admits that plaintiff now has in Wisconsin a force of approximately 500 agents and that the plaintiff has invested, in organizing and building up such establishment, in excess of $25,000, but in this con- [fol. 225] nection alleges that the plaintiff commenced doing business in this state by virtue of the license issued to plaintiff by Commissioner Mortensen on July 13, 1939, and which said license expired by its own terms on May 1,

1940; that the plaintiff knew at the time that it entered the state and commenced to build up its organization that it was extremely doubtful whether the plaintiff's method and plan of operation complied with the laws of the state of Wisconsin and whether such method and plan could be brought in compliance with the laws of said state. Alleges that when plaintiff's license expired it had only some 160 agents in the state and some 2,000 risks which produced some $50,000 annual income for the plaintiff; that the plaintiff proceeded promptly with its first action in the Federal Court to tie the defendant's hands so it could go forward building up its organization so that it could continue to write its unlawful insurance. Alleges that whatever damage the plaintiff will suffer by reason of the defendant's refusal to license the plaintiff to do business in the state is *damnum absque injuria* and damage which the plaintiff has brought upon itself by its own action in the premises in its various attempts to thwart and defy the laws of the state and which said laws the plaintiff still seeks to set at naught, thwart and defy in the instant action.

The defendant admits that he intends to enforce the insurance laws of the state against the plaintiff, but denies that he will invoke upon the plaintiff large, unjust, unreasonable or irreparable losses and damages for which plaintiff has no remedy at law that is just or adequate and denies that the writ of injunction is the only writ that can save and preserve to the plaintiff its rights until the matters in controversy are adjusted in a lawful and orderly manner [fol. 226] or until the defendant has been compelled to renew plaintiff's license for the license year ending Apr. 30, 1944 at the end of this litigation.

20. The defendant admits that as Commissioner of Insurance he has only such powers and duties as are delegated to him by virtue of the statutes of the state of Wisconsin but denies that his refusal to renew plaintiff's license for the period May 1, 1943 to April 30, 1944 was or is erroneous, arbitrary, capricious or without warrant in law or in violation of any ministerial duty imposed by statute upon the defendant.

21. Denies all allegations contained in paragraph 24 and the first subparagraph of paragraph 25 of the complaint.

22. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations in the second subparagraph of paragraph 25 of the complaint, but alleges that if any such results occur they are *damnum absque injuria* and results brought about by the plaintiff's conduct in the premises in violation of the laws of the State of Wisconsin.

23. Further answering and for a separate defense defendant alleges that the questions of whether the plaintiff company's unearned premium reserves are in compliance with the laws of the state, whether they can be made to comply therewith, whether for all purposes of Wisconsin laws plaintiff's life membership fees are premiums, all related questions, all questions passed upon by the Supreme Court in the decisions herein referred to, and all constitutional questions sought to be raised in paragraphs 24 and 25 of the complaint have been answered and determined adversely to the position and contentions of the plaintiff in the instant action in Duel v. State Farm Mutual Automobile Insurance Company, 240 Wis. 161 1 N. W. (2) 887 (motion [fol. 227] for rehearing denied by opinion, 2 N. W. (2) 871) and that all such matters are *res adjudicata*.

John E. Martin, Attorney General; James Ward Rector, Deputy Attorney General; Harold H. Persons, Assistant Attorney General, Attorneys for Defendant.

[fol. 228] In Circuit Court of Dane County

[Title omitted]

Order as to Pleadings, Etc.—Filed June 20, 1943

Upon reading and filing the annexed written stipulation and being fully advised in the premises;

It Is Hereby Ordered that said Stipulation and the arrangement therein set forth is hereby approved; and

It is Hereby Further Ordered that the motion for summary judgment made by the defendant in the case commenced in this Court in 1942 bearing the same title as this case and referred to as Case No. 3, the decision on which motion is now pending, together with all affidavits and

proofs presented in said Case No. 3 as applicable to said motion, all arguments made in said Case No. 3 in respect to said motion, and all briefs of counsel submitted in said Case No. 3 in relation to said motion, shall be considered and stand as made, filed, presented and submitted in the present case to the same effect as if repeated herein.

Dated this 5th day of June, 1943 at Madison, Wisconsin.

By the Court, August C. Hoppmann, Circuit Judge.

[File endorsement omitted.]

[fol. 229] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

STIPULATION AS TO PLEADINGS, ETC.

It is hereby stipulated and agreed between the parties by their respective attorneys:

1. That the motion for summary judgment made by the defendant in the case commenced in this Court in 1942 bearing the same title as this case and referred to as Case No. 3, the decision on which motion is now pending, together with all affidavits and proofs presented in said Case No. 3 as applicable to said motion, all arguments made in said Case No. 3 in respect to said motion, and all briefs of counsel submitted in said Case No. 3 in relation to said motion, shall be considered and stand as made, filed, presented and submitted in the present case to the same effect as if repeated herein, and

2. That an order to the above effect may be made and entered herein to the above effect without any further notice to any of the parties.

Date: June 3, 1943.

Signed R. M. Rieser, Herbert H. Naujoks, Attorneys for Plaintiff; John E. Martin, Attorney General; James Ward Rector, Deputy Attorney General; Harold H. Persons, Assistant Attorney General, Attorneys for Defendant.

May 26, 1943.

[fol. 230] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

Action Instituted in April, 1943

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT—Filed June 21, 1943

The defendant herein by John E. Martin, Attorney General for the State of Wisconsin, and Harold H. Persons, Assistant Attorney General, as his attorneys, moved the court for summary judgment dismissing the plaintiff's complaint herein. The plaintiff by R. M. Rieser and H. H. Naujoks, its attorneys, and Ekern, Meyers—Matthias of counsel, opposed the motion.

Upon the whole record and the motion papers, and after listening to the arguments of counsel and examining their briefs, and the court being fully advised in the premises;

It is ordered:

1. That the motion for summary judgment dismissing the plaintiff's complaint be and hereby is granted.

2. That no motion costs are allowed.

3. Let judgment be entered accordingly.

Dated, June 21, 1943.

By the Court: August C. Hoppmann, Judge.

[fol. 231] MEMO

It is the opinion of this court that the decision of our court in the case of Duel v. State Farm Mutual Automobile Insurance Company, reported in 240 Wis. 161, is decisive of the motion for summary judgment in this action.

[fol. 232] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

(Action IV—Instituted April, 1943)

JUDGMENT—Filed July 3, 1943

The above entitled action having been heard before the Court, without a jury, on the defendant's motion for summary judgment, the plaintiff appearing by its attorneys, Rieser & Mathys, represented by R. M. Rieser, and Ekern & Meyers, represented by Herbert H. Naujoks, and the defendant appearing by its attorney, John E. Martin, Attorney General of Wisconsin, represented by James Ward Rector, Deputy Attorney General and Harold H. Persons, Assistant Attorney General, and after considering the affidavits, records and documents attached to the motion of the plaintiff, the affidavits, records and documents submitted by the plaintiff in opposition thereto, and all of the records, files and proceedings herein and the arguments of counsel and briefs submitted, the Court having filed [fol. 233] a memorandum opinion and entered an order herein on the 21st day of June 1943 granting the defendant's motion for summary judgment dismissing the plaintiff's complaint and directing the entry of judgment accordingly;

It is hereby adjudged:

1. That the plaintiff's complaint herein and this action be and the same hereby are dismissed.

2. That neither of the parties shall recover any costs of the other, except that the defendant shall recover of the plaintiff the sum of $——, unpaid clerk's fees (to be inserted by the Clerk herein if not paid by the plaintiff).

3. That the temporary injunction heretofore entered on the 29th day of April, 1943, is hereby vacated and set aside.

Dated July 3rd, 1943.

By the Court, August C. Hoppmann, Circuit Judge.

Approved as to form prior to signature: R. M. Reiser, Attorneys for Plaintiff; H. H. Persons, Attorneys for Defendant.

[fol. 234] In Supreme Court of Wisconsin

[Title omitted]

(Action No. 3) Action instituted in May 1942

Minute Entry—Dec. 7, 1943

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Herbert H. Naujoks, Esq., R. M. Rieser, Esq., and E. A. Meyers, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 235] In Supreme Court of Wisconsin

[Title omitted]

(Action No. 4) Action instituted in April 1943

Minute Entry—Dec. 7, 1943

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Herbert H. Naujoks, Esq., R. R. Rieser, Esq., and E. A. Meyers, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 236] In Supreme Court of Wisconsin

Dane Circuit Court

Opinion by Justice Fowler

State Farm Mutual Automobile Insurance Company, an Illinois corporation, Appellant,

vs.

Morvin Duel, Commissioner of Insurance of the State of Wisconsin, Respondent

(Action No. 3) Action instituted in May 1942

Judgment—Jan. 18, 1944

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, affirmed.

[fols. 237-238] In Supreme Court of Wisconsin

Dane Circuit Court

Opinion by Justice Fowler

State Farm Mutual Automobile Insurance Company, an Illinois corporation, Appellant,

vs.

Morvin Duel, Commissioner of Insurance of the State of Wisconsin, Respondent

(Action No. 4) Action instituted in April 1943

Judgment—Jan. 18, 1944

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, affirmed.

[fol. 239] IN SUPREME COURT OF WISCONSIN

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance, Respondent

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Appellant,

v.

MORVIN DUEL, Commissioner of Insurance, Respondent

(Case No. 4)

Appeals from judgments of the circuit court for Dane County: August C. Hoppmann, Circuit Judge. *Affirmed.*

Actions in equity by the State Farm Mutual Automobile Insurance Company against Morvin Duel, Commissioner of Insurance for the state of Wisconsin. From summary judgments dismissing the complaints the plaintiff appeals. The controlling facts are stated in the opinion.

OPINION

[fol. 240] FOWLER, J.:

The plaintiff insurance company brought actions to enjoin the defendant insurance commissioner from interfering with the plaintiff in conducting an automobile insurance business in Wisconsin under its plan of conducting such business in the state and as incidental relief asked that the court require the defendant to issue to it a license to conduct such business. One action involves a license for the year 1942. A like action involves the year 1943. The defendant interposed answers and upon the pleadings and certain affidavits in support thereof moved for a summary judgment dismissing the complaints. Affidavits were filed by the plaintiff in opposition. The court granted judgments of dismissal.

These cases are sequels to a case between the same parties reported in 240 Wis. 161, et seq., 1 N. W. (2d) 887.

In that case the instant defendant was plaintiff and the suit was brought "to enforce orders of the plaintiff • • • declining to renew defendant's license to conduct the insurance business in the state of Wisconsin for the license periods" there involved. See p. 165 of the opinion. The gist of that controversy may be stated as follows: The company was doing business in face of the commissioner's refusal to renew its license. The company claimed it was entitled to a renewal and had submitted an application therefor that showed it to be so entitled, and the commissioner wrongfully refused to grant it. The commissioner refused to grant the renewal on the ground that the company had not set up the reserve required by sec. 201.18 (1) Wis. Stats., in that it had not included in such reserve [fol. 241] fifty per cent of the premiums received from its policyholders because it omitted therefrom fifty per cent of the membership fees received from them, which fees the commissioner contended were a part of the company's premiums. We held as matter of law that the membership fees were a part of the company's premiums and fifty per cent of them must be included in the reserve required by the statute above cited. On motion for rehearing interposed by the company that holding was adhered to.

The company was then and is now doing business in many states. In states other than Wisconsin it continues to exact the membership fees which we held in the former case are part of its premiums. Upon conclusion of the former case the company adopted a new scheme for doing business in Wisconsin and submitted it to the commissioner in applications for licenses for the years 1942 and 1943. The scheme is to require no membership fees from its Wisconsin policyholders but to do business in Wisconsin on a level premium basis, while continuing to exact membership fees in other states. The premiums required to be paid in Wisconsin are twenty-seven per cent higher than the premiums required in the other states that construe premiums as not including membership fees. This twenty-seven per cent difference represents the difference between the premiums here and elsewhere as the word "premium" is construed here and elsewhere. The commissioner refuses to grant the defendant the licenses required on the same ground that it refused renewal of the licenses applied for in the former case, viz: the reserve of the company required by sec. 201.18 (1) does

not include fifty per cent of the premiums received in other [fol. 242] states as it does not include fifty per cent of the membership fees required in other states.

The commissioner also asserts as ground for denying the company a license that the company unlawfully exacted membership fees from its Wisconsin policyholders prior to the former decision of this court, and he may require of the company a refund of the fees wrongfully exacted as a condition of issuing it a license. The idea seems to be that the company's hands are dirty and it must wash them before it can come into a court of equity. That the clean hands doctrine does not apply to the instant situation is obvious. The company could not because of its own wrong repudiate its insurance contracts with Wisconsin policyholders. It was liable on those contracts. The Wisconsin policyholders got valid insurance at the price they agreed to pay and at the price that policyholders in other states paid and at a price not in excess of the price at which it was customarily furnished by other insurance companies. The policy-holders themselves, having had the benefit of valid insurance, could not recover the part of the price covered by the membership fees. The commissioner can not require return of those fees in behalf of the policyholders when they could not themselves require return. He obviously can not require it in this own right. And he can not require it in enforcement of any public right both because he is not an officer in whom the power to enforce public rights is vested and because there is no statute imposing such return as a penalty for not complying with the statutory requirement. [fol. 243] Recurring to the ground of the commissioner's refusal of a license first above stated, the commissioner contends that the reserve required by sec. 201.18 (1) is to cover the overall liability of the company and that it was so decided in the former case. The company contends that this reserve is not to cover the company's overall liability, but only its liability to return to its policyholders their unearned premiums in case of cancellation of their policies; and that as in other states the membership fees are not subject to return as unearned premiums in case of cancellations in those states, there is no need or occasion to include fifty per cent of these fees in the reserve set up to secure return of unearned premiums, and that the company has fully met the purpose of the statute by setting up as an unearned pre-

mium reserve for Wisconsin members fifty per cent of the premiums paid by them and fi per cent of the premiums paid in other states as those states construe premiums.

We unquestionably decided in the former case that membership fees exacted by the company from its policyholders are a part of the premiums paid by them, and that before the company could have a license to do business in this state it had to set aside a reserve comprising fifty per cent of

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Sec. 201.18 (1) Reserves, basis for. The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by sec. 201.50.

[fol. 244] what it designated as premiums and fifty per cent of the membership fees, in order to meet the requirement of sec. 201.18 (1). That statute is here set out in the margin. The company refuses to do this and seeks to justify its refusal by not exacting the membership fee from its Wisconsin policyholders but to exact from them an increase of the premiums paid by them by an amount equivalent to the membership fees exacted from policyholders in other states. Manifestly this does not meet the requirements of the statute. The statute specifically designates the amount of this reserve. It requires the designated amount to be maint-ed wholly independent of the company's solvency in the sense that its assets equal its overall liabilities. No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it can not have a license to do business in this state and it can not do business in this state without a license authorizing it to do it. The statute is so written and it has been declared valid, and as it is written it must be executed. We are not concerned with the

wisdom of the statute, nor with the probability of the company's meeting the obligation to refund unearned premiums out of its surplus or its contingent reserve or its other assets. We are only concerned with the carrying out of the legislative intent evidenced by it. Nor are we attempting to interfere with the manner in which the company shall do its business in other states or with the manner in which the company's contracts shall be construed in other states. The [fols. 245-246] company seems to think that its constitutional rights are in some way interfered with by the commissioner's refusal to issue it a license. We are unable to perceive that any such question is involved in view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do.

We think this is all that need be said to support an affirmance of the judgment. If anything else is necessary to an understanding of this decision it may be found in the opinion of the former case.

By the Court. The judgments of the circuit court are affirmed.

[fol. 247] IN SUPREME COURT OF WISCONSIN

[Title omitted]

(Case No. 4)

MOTION FOR REHEARING—Filed February 7, 1944

To John E. Martin, Attorney General; Harold Persons, Assistant Attorney General:

The above named appellant in the above entitled causes by its attorneys Ekern, Meyers & Matthias and Rieser & Mathys, hereby moves the above named honorable court for a rehearing in the above entitled causes for the reason that the decision heretofore rendered in said causes by said court on the 18th day of January, 1944, and the order of the court therein is contrary to law in the particulars which will be more fully stated in the printed brief to be filed by said appellant, and that there are uncertainties and ambiguities in

[fols. 248-249] said decision which require clarification as will likewise be pointed out.

Dated at Madison, Wisconsin, February 7, 1944.

Ekern, Meyers & Matthias, Chicago, Illinois; Rieser & Mathys, Madison, Wisconsin, Attorneys for Appellant State Farm Mutual Automobile Insurance Company.

R. M. Rieser, Herbert H. Naujoks, of Counsel.

Due service of the within Motion for Rehearing admitted this 7th day of February, 1944.

John E. Martin, Attorney General of Wisconsin, by Harold H. Persons, Asst. Atty. General, Attorney for Respondent.

[fol. 250] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTIONS FOR REHEARING—March 14, 1944

The Court being now sufficiently advised of and concerning the motions of the said appellant for a rehearing in these causes, it is now here ordered that said motions be, and the same are hereby, denied with $25.00 costs.

[fol. 251] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Titles omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed May 16, 1944

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled action, by their respective counsel, pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States, that only the following portions of the record be included in the transcript of the record to be submitted to the United States Supreme Court, provided, however, that all documents and other portions

of the record otherwise required by the Revised Rules of the Supreme Court of the United States to be included in [fol. 253] such transcript, whether specifically mentioned in this Stipulation or not, shall be included in the Clerk's transcript;

1. The summons and complaint with exhibits attached in the 1942 action, Case No. 3, except Rate Schedules of Exhibit 2.

2. The answer in the 1942 action, Case No. 3.

3. The motion for summary judgment, by appellee Morvin Duel, with attached exhibits, affidavit of Morvin Duel and John Lange, but omitting the printed briefs and Exhibit E.

4. The affidavit of Paul Jones dated October 1, 1942.

5. The affidavit of Adlai H. Rust dated September 30, 1942.

6. The order and memorandum opinion of the Circuit Court for Dane County, Wisconsin, granting the motion for summary judgment.

7. The judgment of the Circuit Court for Dane County, Wisconsin, dated July 3, 1943, dismissing appellant's action.

8. The notices of appeal to the Wisconsin Supreme Court.

9. The summons and complaint with attached exhibits in the 1943 action, Case No. 4, except Rate Schedules of Exhibit 2.

10. The answer in the 1943 action, Case No. 4.

11. The stipulation and order dated June 5, 1943, that the motion for summary judgment in Case No. 3 be applicable to the 1943 action, Case No. 4.

12. The motion for summary judgment.

13. Judgment of the Circuit Court for Dane County, Wisconsin, dated July 3, 1943, dismissing appellant's action.

14. Decision and judgment of the Supreme Court of Wisconsin dated Jan. 18, 1943, affirming judgment of the lower court.

15. Decision of the Wisconsin Supreme Court dated [fols. 253-254] March 14, 1944, denying appellant's motion for rehearing.

16. Appellant's petition for allowance of appeals, including assignment of errors.

17. Appellant's statement of jurisdiction.

18. Order of the Wisconsin Supreme Court allowing appeal.

19. Copy of appellant's bond as approved by the Wisconsin Supreme Court.

20. Appellant's citation to appellee.

21. Appellant's statement of points to be relied upon.

22. Stipulation of the parties designating parts of the record to be transmitted.

Dated at Madison, Wisconsin, this 16th day of May, 1944.
R. M. Rieser, Herbert H. Naujoks, Counsel for Appellant. John E. Martin, Attorney General of Wisconsin, by Harold H. Persons, Assistant Attorney General, Counsel for Appellee.

[fol. 255] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 256] Supreme Court of the United States

Statement of Points to be Relied upon—Filed June 1, 1944

Comes now the appellant in the above entitled cause and states the points upon which he intends to rely in this Court in this case are as follows:

1. That the Supreme Court of the State of Wisconsin erred in finding and holding that Section 201.18 of the Wisconsin Statutes, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, required such foreign company to set up reserves on membership fees collected in states other than Wisconsin where such other states do not require any reserve on membership [fol. 257] fees and where there is no liability under the contracts and laws of such other states for the return of

any portion for such membership fees collected by the company in such other states.

2. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, was invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States of America as affecting contracts and operations of the said State Farm Mutual Automobile Insurance Company beyond the jurisdiction of the State of Wisconsin.

3. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, constituted a deprivation of property of the State Farm Mutual Automobile Insurance Company without due process of law and beyond the power of the State of Wisconsin, and therefore invalid as in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, under the existing facts, was invalid and void as in violation of the full faith and credit clause, Article IV, Section 1, of the Constitution of the United States of America.

5. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, and its contracts made in states other than Wisconsin, under the existing facts, was invalid as in conflict with Article I, Section 10, of the Constitution [fol. 258] of the United States, as impairing the obligation of contracts in violation of said constitutional provision.

6. The Supreme Court of Wisconsin erred in failing to hold that Section 201.18, Wisconsin Statutes, 1939, so far as it purports to require the State Farm Mutual Automobile Insurance Company, an Illinois corporation, to set up reserves on membership fees collected in states other than Wisconsin, is invalid and void as violative to the Constitu-

tion of the United States and the decisions of the Supreme Court of the United States under such constitution as affecting contracts and operations of the State Farm Mutual Automobile Insurance Company beyond the jurisdiction of the State of Wisconsin.

* * * * * * *

[fol. 259] R. M. Rieser, P. O. Address: 1 West Main Street, Madison, Wisconsin; Herbert H. Naujoks, P. O. Address: 1 North LaSalle St., Chicago, Illinois. Attorneys for Appellant.

Service of copy of the within admitted this May 3, 1944. Harold H. Persons, Assistant Attorney General, Counsel for Respondent.

[fol. 259a] [File endorsement omitted]

[fol. 260] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING THE RECORD—Filed June 12, 1944

It Is Hereby Stipulated by and between the parties to the above entitled proceeding now pending in the Supreme Court of the United States that in lieu and in place of the parts of the record designated by the appellant to be printed (R. 41-42), there be printed as and for the record in the Supreme Court of the United States the following parts of the record identified herein according to title and according to pages of the record as now filed in the Supreme Court of the United States:

[fol. 261]

Title of Paper	*Page of Record*
Petition for Allowance of Appeal, Assignments of Error, and Prayer for Reversal	1-5
Order Allowing Appeal and Fixing Bond	6-9
Copy of Bond (Omit)	10-12
Statement of Jurisdiction	13-38
Statement of Points to be Relied upon and Designation of the Parts of the Record to be printed (Omit last paragraph of page 41 and page 42 in view of this Stipulation.)	39-43
Citation, with affidavit of service (Omit)	44-46

Title of Paper	*Page of Record*
Stipulation	47-49
Appellee's Statement Opposing Jarisdiction	50-65
Pleas, Wisconsin Supreme Court	66
Notice of Appeal to Wisconsin Supreme Court and Undertaking	67-69
Complaint, 1942 Action, Case No. 3 (Omit summons and that part of Exhibit 2 appearing on pages 93-94 of the record.)	70-102
Answer, 1942 Action, Case No. 3	103-120
Motion for summary judgment, by appellee Morvin Duel	121-130
Affidavit of Paul F. Jones dated October 1, 1942	131-135
Affidavit of Adlai H. Rust dated September 30, 1942	136-170
Order and Memorandum opinion of the Circuit Court for Dane County, Wisconsin, granting the motion for Summary Judgment	171-172
Judgment of the Circuit Court for Dane County, Wisconsin, dated July 3, 1943, dismissing appellant's Action	173-174
Notices of Appeal to the Wisconsin Supreme Court	175
Complaint, 1943 Action, Case No. 4 (Omit Summons and that part of Exhibit 2 appearing on pages 199 to 200 of the record.)	176-208
Answer, 1943 Action, Case No. 4	209-227
Stipulation and Order dated June 5, 1943	228-229
Motion for summary judgment (See pages 121-130) (Omit)	
Order and Memorandum Opinion of the Circuit Court	230-231
Judgment of the Circuit Court for Dane County, Case 4	232-233
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Order Retaining Record (Omit)	249
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Stipulation for Transcript of Record	251-254
Certificate of Clerk of Wisconsin Supreme Court (Omit)	255

It is stipulated that the parts designated as "omit" in the foregoing schedule of items comprising the record need not be printed in the Supreme Court of the United States and that the filing of this Stipulation shall take the place of the previous designation of the parts of the record to be printed appearing at pages 41 and 42 of the record.

Dated June 9th, 1944.

R. M. Rieser, Herbert H. Naujoks, Attorneys for the Appellant. John E. Martin, Attorney General. By Harold H. Persons, Assistant Attorney General, Attorney for the Appellee.

[fol. 263] [File endorsement omitted]

[fol. 264] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 115

ORDER NOTING PROBABLE JURISDICTION—October 9, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsed on cover]: File No. 48,557. Wisconsin Supreme Court, Term No. 115. State Farm Mutual Automobile Insurance Company, an Illinois Corporation, Appellant, vs. Morvin Duel, Commissioner of Insurance of the State of Wisconsin. Filed June 1, 1944. Term No. 115 O. T. 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

ROBERT M. RIESER,
HERBERT H. NAUJOKS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115.

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, *Appellant*,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, *Appellee*.

(Case No. 4)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, *Appellant*,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, *Appellee*.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECISION AND DECREE APPEALED FROM AS REQUIRED BY UNITED STATES SUPREME COURT RULE 12.

Pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the above named appellant files this, its separate statement, particularly disclosing the basis on which it is contended the Supreme

Court of the United States has jurisdiction upon appeal to review the judgment appealed from herein.

The appellant, in support of the jurisdiction of this court to review the above entitled cause on appeal, respectfully represents:

(a) Basis On Which It Is Contended That the United States Supreme Court Has Jurisdiction Herein.

The case is one in which the validity of a statute of the State of Wisconsin as applied in refusing renewal of a license to do all forms of automobile insurance business in Wisconsin to the appellant, an Illinois corporation, was drawn in question, upon the ground that the statute as applied is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, to the full faith and credit clause of the Constitution of the United States, and to Article I, Section 10, of the Constitution of the United States, forbidding impairment of the obligation of contracts.

The final decision of the Supreme Court of the State of Wisconsin, the court of last resort in that state, is in favor of the validity of the state as applied. Therefore, in accordance with the Rules of the Supreme Court of the United States (Rule 46, paragraph 2), the case is one in which, under the legislation in force when the act of January 31, 1928, (45 Stats. L. 541) was passed, to-wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A., Section 344), a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

(b) The Statutory Provisions Sustaining Jurisdiction.

The statute supporting jurisdiction in this case is Section 237 (a) of the Federal Judicial Code (28 U. S. C. A., Section 344 (a)) which provides:

"A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or *where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error.*" (Emphasis ours.)

Petitioner also relies on Rule 46 of the Rules of the United States Supreme Court and particularly on paragraph two thereof, which provides in part:

"Under the Act of January 31, 1928, as amended by the act of April 26, 1928, a review which theretofore could be had in this court on writ of error, may now be obtained on an appeal * * *."

(c) The Statute and Laws of the State of Wisconsin, the Validity of Which Is Involved.

The statutes and laws of the State of Wisconsin, as construed and applied in this case, which are involved are as follows:

"Section 201.18, Wisconsin Statutes, 1939, which provides:

"*Reserves, basis for.* (1) The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by section 201.50."

(d) Date of Judgment to Be Reviewed and Date of Application for Appeal.

The date of the judgment and decision of the Supreme Court of the State of Wisconsin sought to be reviewed is January 18, 1944, as modified and supplemented by the decision and judgment denying petition for rehearing by the Wisconsin Supreme Court on March 14, 1944.

The date upon which the application for appeal to the United States Supreme Court was presented is April 28, 1944.

(e) Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied Upon.

The case involves the validity of Section 201.18, Wisconsin Statutes, 1939, as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, in its application for a license to do all forms of automobile insurance business in the State of Wisconsin for the license years from May 1, 1942, to April 30, 1943, and May 1, 1943 to April 30, 1944.

The controversy at issue arose out of the refusal of the Commissioner of Insurance of the State of Wisconsin to renew the license originally granted to the State Farm Mutual Automobile Insurance Company by the Wisconsin Insurance Commissioner on July 13, 1939, for the license years here in question.

The basic facts in connection with this controversy are not in dispute.

The appellant, State Farm Mutual Automobile Insurance Company (hereinafter referred to as the company), is incorporated and does business under the laws of the State of Illinois. It began business in 1922. It writes full coverage

automobile insurance on selected risks on the mutual plan. It is licensed to do business in forty states, territories and districts outside of Wisconsin. In all such other states, territories and districts except Arizona, Louisiana and Texas, the company has continuously operated on the life membership plan as formerly used in Wisconsin. The laws of Arizona, Louisiana and Texas do not permit the use of the life membership plan and in such states the company operates upon the level premium plan as now used in Wisconsin. These three states do not object to license of the company because it uses the life membership plan in other states without reserves thereon (R. 19, 49-50).

The company was licensed to do business in Wisconsin on July 13, 1939, after full investigation and examination of the company and its plan of operation by the then Commissioner of Insurance of Wisconsin, and was authorized at that time to use the life membership plan in this state.

It began to write business in Wisconsin about January 1, 1940. This business steadily increased until the company now has in excess of 25,000 policies in force with an annual premium income in excess of $400,000. Over $25,000 was invested in building the Wisconsin agency plant and it now has more than 500 producing district and local agents (R. 20).

The solvency of the company is well established. (Affidavit of Jones, Director of Insurance of Illinois) (R. 81-83). The last annual sworn statement of the company on file with the Insurance Department of Wisconsin, shows that as of December 31, 1943, the company had total admitted assets of $37,055,197.93. Its total liabilities as of that date, including a voluntary and unassigned contingent reserve of $6,000,000 were $25,163,141.65. As of that date, its net free surplus available for any contingency was $11,892,056.28 (R. 12).

From January 1, 1940, when the company began doing business in Wisconsin, until April 27, 1942, the life membership fee plan as approved by the Insurance Commissioner of Wisconsin in 1939, was used in this state. The membership fee contract between the company and the policyholder as set out in the policy, was as follows:

> "The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for which said fees were paid so long as this company continues to write such coverages and the insured remains a desirable risk" (240 Wis. 161).

The membership fee was collected once only with the premium for the initial term of six months. Each policy with which a membership fee was collected has been in force for its full term of six months except only in those instances where the policy was cancelled during the initial term by either the company or the policyholder (R. 15-16).

In due season and prior to May 1, 1940, the company applied for renewal of its license for the license year beginning on that date. A license was denied and ensuing litigation began in 1940 ultimately resulted in the decision of *Duel v. State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161; 1 N. W. (2d) 887; Rehearing denied March 13, 1942, 2 N. W. (2d) 871. This decision reversed the finding of Insurance Commissioner Mortenson made in 1939 and for the first time judicially held that the life membership plan as used by the company was not permissible in Wisconsin.

After this court denied the petition for rehearing in the *Duel* case, 240 Wis. 161, and prior to April 15, 1942, the company's representatives requested a conference with the Insurance Commissioner through the office of the Attorney General, his counsel, in order to determine what steps, if any, it might take to remove his objections to licensing the

plaintiff. The Commissioner declined to take part in such conference but the company's representatives were finally granted an audience with an assistant attorney general representing the Insurance Commissioner. This individual advised the company that there were no circumstances under which the company could be licensed (R. 92, 93). Thereafter, on April 15, 1942, the company advised the Commissioner of Insurance of its intention of abandoning use of the life membership fee plan in Wisconsin and by the adoption of a new policy and new level premium rates so as to do business on the same plan and method as other companies operating in Wisconsin. New policies and rates were accordingly filed with the Insurance Commissioner and from and after April 27, 1942, the company has continued to transact business in Wisconsin on the level premium plan in accordance with such filings (R. 94).

These suits involve the license years beginning May 1, 1942 and May 1, 1943. At no time during such license years, did the company use the life membership fee plan in Wisconsin.

Notwithstanding the above change in plan of operation in Wisconsin, the Commissioner refused a license for the year beginning May 1, 1942 and the first of these actions was commenced to compel him to do so.

On May 1, 1943, the Commissioner again refused to issue a license for the license year beginning on that date and in order to remove any claim of mootness as to the previous 1942 action, a new action was commenced and it was stipulated between the parties that the issues in the two pending cases on review were identical and that pleadings and proceedings to that date in the first case should govern the pleadings and proceedings in the second case (R. 58, 1943 case). The Commissioner of Insurance moved the Circuit Court for Dane County, Wisconsin, for a summary judg-

ment dismissing the first action and sustaining the Commissioner on his refusal of license and a similar motion was made in the 1943 action based upon the showing in the 1942 action.

The Circuit Court for Dane County, Wisconsin, Hon. August C. Hoppmann, Judge presiding, on June 21, 1943 entered orders granting the Commissioner's motion for summary judgment in each case. The court filed a memorandum opinion as follows:

> "It is the opinion of this court that the decision of our court in the case of *Duel* v. *State Farm Mutual Automobile Insurance Co.*, reported in 240 Wis. 161, is decisive of the motion for summary judgment in this action."

On January 18, 1944, the Wisconsin Supreme Court made and entered its decision and judgment affirming the judgment of the Circuit Court for Dane County, Wisconsin (244 Wis. (Adv. Sh.) 429). A motion for rehearing was denied by the Wisconsin Supreme Court on March 14, 1944 (— Wis. (Adv. Sh.) —).

The cases believed to sustain the jurisdiction of this court are as follows:

(a) The decree of the said Supreme Court of the State of Wisconsin herein appealed from is final:

North Carolina Railroad Co. v. *Story*, 268 U. S. 288, 69 L. Ed. 959 (—);

Tippecanoe County v. *Lucas*, 93 U. S. 108, 23 L. Ed. 822 (—);

Bostwick v. *Brinkerhoff*, 106 U. S. 3, 27 L. Ed. 73 (—);

Conn. Gen. Ins. Co. v. *Johnson*, 303 U. S. 77, 58 Sup. Ct. 77 (—);

Hooper v. *Tax Commissioner*, 284 U. S. 206;

J. Adams Mfg. Co. v. *Storen*, 304 U. S. 307.

(b) In said cases and by the decision of the Supreme Court of the State of Wisconsin there is therein drawn in question the validity of a statute of the State of Wisconsin, to-wit: Section 201.18 of the Revised Statutes of the State of Wisconsin of 1941, on the ground of its being repugnant to the Constitution of the United States and there are three major Federal constitutional questions raised by the assignments of error, to-wit:

First, whether the law as now finally construed by the Wisconsin Supreme Court as applied to the contracts and operations of the State Farm Mutual Automobile Insurance Company outside of the State of Wisconsin, deprives the policyholders of property without due process of law and in contravention to the Fourteenth Amendment of the Constitution of the United States.

Second, whether the law as now construed by the Supreme Court of Wisconsin and as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, is in violation of Article IV, Section 1, of the Constitution of the United States, the full faith and credit provision.

Third, whether the law as now construed by the Wisconsin Supreme Court as applied to the State Farm Mutual Automobile Insurance Company, an Illinois corporation, and as affecting contracts of the company made outside of the State of Wisconsin, is in violation of Article I, Section 10, of the Constitution of the United States as impairing the obligation of contracts made by the State Farm Mutual Automobile Insurance Company.

(c) A substantial Federal question is involved concerning the jurisdiction of the State of Wisconsin to require under Section 201.18 (Wisconsin Statutes 1941), a foreign insurance company to set up in Wisconsin reserves on membership fees collected by such foreign company in states outside of Wisconsin where such other states require no

reserves on such membership fees and where under the laws of such states and the contract of the company, there is no liability to return at any time any portion of such membership fees. Section 201.18 of the Wisconsin Statutes of 1941 relates to unearned premium reserves required of insurance companies to reflect present and future estimated liabilities. The Wisconsin Supreme Court held that under said section of the Wisconsin Statutes, the appellant, an Illinois corporation, is required, as a condition to carry on business in Wisconsin, to create an unearned premium reserve upon membership fees collected in thirty-eight other states in which appellant is licensed. Under the laws of Wisconsin the membership fee is held to be a part of the premium collected. In the thirty-eight other states the membership fee is held not to be a part of the premium. Under the laws of such other states the membership fee contract is accepted as binding and lawful, the fee collected is not required to be treated as part of the premium and no obligation of any kind exists for its return as a part of any premium or otherwise. As construed by the Wisconsin Supreme Court, the Wisconsin Statute requires the plaintiff to reflect upon its books an item as a liability, but in the thirty-eight other states as to business done in such states it is not a liability. Wisconsin has no interest in such membership fees and policyholders in Wisconsin can obtain no benefit from a reserve so required. As thus applied, the statute conflicts with the decisions of this court which hold that:

> "* * * the issue remains whether the insurance enterprise as a whole affects the New York (Wisconsin) interests as to give New York (Wisconsin) the power it claims." *Hoopeston Canning Co. v. Cullen*, 318 U. S. 213.)
>
> *Allgeyer v. Louisiana*, 165 U. S. 578 (1897);
> *New York Life Ins. Co. v. Head*, 234 U. S. 149 (1914);

Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426 (1926);
Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494 (1926);
Firemen's Ins. Co. v. *Beha*, 30 Fed. (2d) 539 (1928);
Factory Mutual Liab. Ins. Co. v. *Beha*, 253 N. Y. S. 562; Appeal dismissed 259 N. Y. 571 (1931);
Osborn, et al. v. *Ozlin, et al.*, 310 U. S. 53 (1940).

It is the contention of appellant that the right of the Commissioner of Insurance of Wisconsin to demand of the company reserves on membership fees collected in other states as a condition of license is in direct conflict with the doctrine laid down by this Court in the above cases.

(d) A substantial federal question is also involved concerning the right of the State of Wisconsin to require reserves on membership fees collected in states outside of Wisconsin in view of Article IV, Section 1 of the Constitution of the United States, the full faith and credit provision.

Section 1 of Article IV of the United States Constitution provides in part as follows:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

See 12 American Jurisprudence, Title "Constitutional Law," Section 707, at page 382.

(e) A substantial federal question is involved in the right of the State of Wisconsin to impair the obligation of contracts made by the State Farm Mutual Automobile Insurance Company in states other than Wisconsin in view of Article I, Section 10 of the Constitution of the United States.

Section 10 of Article I of the United States Constitution provides in part as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contract, * * *."

Allgeyer v. *Louisiana*, 165 U. S. 578 (1897);
New York Life Ins. Co. v. *Dodge*, 246 U. S. 357, 373 (1918);
Hardware Dealers Mut. Fire Ins. Co. v. *Glidden Co.*, 284 U. S. 151, 157-158 (1931).

(f) Stage of Proceedings and Manner in Which the Federal Questions Were Raised.

The federal questions on which Assignments of Error have been made have been raised in each step of this litigation before the appropriate courts.

The federal questions here involved were raised in the Circuit Court for Dane County, Wisconsin, when the original actions were instituted by the State Farm Mutual Automobile Insurance Company. The same federal constitutional questions were again specifically raised in the Supreme Court of the State of Wisconsin in the brief filed before that court, which is the only method under Wisconsin practice where such questions can be raised and such constitutional questions were argued before the court in oral argument.

(g) Manner in Which Questions Involved Were Passed on by the Court.

The Circuit Court for Dane County, Wisconsin, denied the relief sought to the company. The Supreme Court of the State of Wisconsin further specifically passed on the federal constitutional questions on which error has been assigned, and denied relief to the company.

(h) Excerpts from the Record Bringing the Case within the Statute Conferring Jurisdiction upon the Supreme Court.

There is no question but what in these proceedings the federal constitutional questions on which errors have been assigned were drawn in question on the ground that the law was repugnant to the several provisions of the Consti-

tution of the United States hereinbefore referred to and that decisions of the state courts were in favor of the validity of the law here involved. Typical of the method in which these matters were raised in the record are the following excerpts from the briefs filed before the Circuit Court for Dane County, Wisconsin:

Page of Appellant's Brief in Circuit Court for Dane County, Wisconsin.

D. If Sections 201.34 and 201.18, Stats., be construed to have extraterritorial effect, such application will violate the plaintiff company's rights under the Fourteenth Amendment to the U. S. Constitution 26

E. If Sections 201.34 or 201.18 be construed to have extraterritorial effect, such construction will violate the plaintiff company's rights under Article I, Section 10 of the U. S. Constitution 28

(1) Article I, Section 10 of the U. S. Constitution provides in part 28

F. If Sections 201.34 or 201.18, Wis. Stats., be construed to have extraterritorial effect, such construction would violate the full faith and credit clause of the U. S. Constitution, Section I, Article 4 29

(1) Article 4, Section 1 of the U. S. Constitution provides 29

(2) The defendant Commissioner's construction of the pertinent insurance statute violates Article 4, Section 1 of the U. S. Constitution 29

The federal questions were further raised in the briefs of the appellant filed in the Supreme Court of the State of Wisconsin, as follows:

Page of Appellant's Brief in the Supreme Court of Wisconsin.

C. If Sections 201.18, 204.27, 201.34 and 201.40 be construed to require reserves on membership

fees lawfully collected in other states, such construction will violate the company's rights under the Fourteenth Amendment and Article I, Section 10 and Article IV, Section 1 of the United States Constitution and Article I of Section 13 of the Wisconsin Constitution 20

a. Defendant contends the Company cannot be licensed unless it sets up a liability for membership fees collected in other states where no liability in law or in fact exists and this would reduce the amount of the Company's free assets thus taking its property and thereby injuring its standing everywhere and depriving the Company and its policyholders of the use of the funds tied up in such fictitious reserves, thus reducing their security 21

b. This would constitute a remaking or impairment of life membership fee contracts in other states and if this requirement were sustained, would cause the Company to lose its property rights in Wisconsin, including the value of its premium income, agency plant and good will 21

c. There is a long line of decisions limiting the power of the states to license foreign corporations and under the principle laid down in the *Tafoya* case, 270 U. S. 426 (1926), the requirement of the defendant would violate the Company's rights under the Fourteenth Amendment 24

d. The present controversy is also governed by the decision in the *Factory Mutual* case, 253 N. Y. S. 562; appeal dismissed 259 N. Y. 571 (1931). The *Firemen's* case, 30 Fed. (2d) 539 (1928) relied upon by defendant is distinguishable upon the facts but in accord with the principles laid down in the *Tafoya* case 26-31

e. The demand of the Commissioner that reserves be set up on membership fees collected in other states as a condition of license is in violation of the Fourteenth Amendment and the doctrine laid down in the *Tafoya* and *Factory Mutual* cases 32

f. The demand of the Commmissioner also results in impairing the obligation of the membership fee contracts lawfully made and entered into by the Company in states outside of Wisconsin in violation of Article I, Section 10 of the United States Constitution 32
Authorities Cited

g. The demand of the Commissioner is likewise in violation of Article IV, Section 1 of the United States Constitution, providing that the public acts, records and judicial proceedings in every other state must be given full faith and credit in each of the states within the Union 32
Authorities Cited

h. The demand of the Commissioner if carried out would result in the destruction of the Company's property, business and good will in Wisconsin in violation of Article I, Section 13 of the Wisconsin Constitution 34
Authorities Cited.

(i) Copies of Opinions on Renditions of Judgment.

There are attached hereto the following copies of opinions marked with the respective exhibit number as reflected herein:

Copy of opinion of Circuit Court for Dane County, Wisconsin, copy of the decision of the Supreme Court of Wisconsin in the instant case of January 18, 1944. (244 Wis. (Adv. Op.) 429).

Copy of decision of Wisconsin Supreme Court denying rehearing in the instant case. (Wis. : N. W. (2)).

(j) The Supreme Court of Wisconsin by its decision herein held that Section 201.18 of the Revised Statutes of Wisconsin does not contravene the Constitution of the United States and the amendments thereof by requiring the appellant, a foreign insurance corporation, to set up reserves on membership fees collected in states outside of Wisconsin where such states require no reserves on membership fees collected therein and where under the laws of such states and the contracts of the company, no such reserve is required and where no liability exists for the return of any portion of such membership fees at any time. That such decision and decree of the Wisconsin Supreme Court denies to appellant due process of law as guaranteed by the Constitution of the United States and the amendments thereof, violates the full faith and credit clause of the United States Constitution and impairs the obligation of contracts of the appellant in violation of the guarantees of the Constitution of the United States for the reasons hereinbefore set forth and contrary to the authorities hereinbefore cited.

Dated April 28, 1944.

Respectfully submitted,

ROBERT M. RIESER,
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Counsel for Appellant.

APPENDIX "A".

STATE OF WISCONSIN: CIRCUIT COURT: DANE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin, Defendant

Memo.

It is the opinion of this court that the decision of our court in the case of Duel v. State Farm Mutual Automobile Insurance Company, reported in 240 Wis. 161, is decisive of the motion for summary judgment in this action.

APPENDIX "B".

Nos. 111, 112

January Term, 1944. August Calendar, 1943

STATE OF WISCONSIN; IN SUPREME COURT

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance, Respondent

(Case No. 4)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance, Respondent

Appeals from judgments of the circuit court for Dane county:

August C. Hoppmann, Circuit Judge. *Affirmed.*

Actions in equity by the State Farm Mutual Automobile Insurance Company against Morvin Duel, Commissioner of Insurance for the state of Wisconsin. From summary judgments dismissing the complaints the plaintiff appeals. The controlling facts are stated in the opinion.

Fowler, J. The plaintiff insurance company brought actions to enjoin the defendant insurance commissioner from interfering with the plaintiff in conducting an automobile insurance business in Wisconsin under its plan of conducting such business in the state and as incidental relief asked that the court require the defendant to issue to it a license to conduct such business. One action involves a license for the year 1942. A like action involves the year 1943. The defendant interposed answers and upon the pleadings and certain affidavits in support thereof moved

for a summary judgment dismissing the complaints. Affidavits were filed by the plaintiff in opposition. The court granted judgments of dismissal.

These cases are sequels to a case between the same parties reported in 240 Wis. 161, et seq., 1 N. W. (2d) 887. In that case the instant defendant was plaintiff and the suit was brought "to enforce orders of the plaintiff • • • declining to renew defendant's license to conduct the insurance business in the state of Wisconsin for the license periods" there involved. See p. 165 of the opinion. The gist of that controversy may be stated as follows: The company was doing business in face of the commissioner's refusal to renew its license. The company claimed it was entitled to a renewal and had submitted an application therefor that showed it to be so entitled, and the commissioner wrongfully refused to grant it. The commissioner refused to grant the renewal on the ground that the company had not set up the reserve required by sec. 201.18(1) Wis. Stats., in that it had not included in such reserve fifty per cent of the premiums received from its policyholders because it omitted therefrom fifty per cent of the membership fees received from them, which fees the commissioner contended were a part of the company's premiums. We held as matter of law that the membership fees were a part of the company's premiums and fifty per cent of them must be included in the reserve required by the statute above cited. On motion for rehearing interposed by the company that holding was adhered to.

The company was then and is now doing business in many states. In states other than Wisconsin it continues to exact the membership fees which we held in the former cases are part of its premiums. Upon conclusion of the former case the company adopted a new scheme for doing business in Wisconsin and submitted it to the commissioner in applications for licenses for the years 1942 and 1943. The scheme is to require no membership fees from its Wisconsin policyholders but to do business in Wisconsin on a level premium basis, while continuing to exact membership fees in other states. The premiums required to be paid in Wisconsin are twenty-seven per cent higher than

the premiums required in the other states that construe premiums as not including membership fees. This twenty-seven per cent difference represents the difference between the premiums here and elsewhere as the word "premium" is construed here and elsewhere. The commissioner refuses to grant the defendant the licenses required on the same ground that it refused renewal of the licenses applied for in the former case, viz: the reserve of the company required by sec. 201.18 (1) does not include fifty per cent of the premiums received in other states as it does not include fifty per cent of the membership fees required in other states.

The commissioner also asserts as ground for denying the company a license that the company unlawfully exacted membership fees from its Wisconsin policyholders prior to the former decision of this court, and he may require of the company a refund of the fees wrongfully exacted as a condition of issuing it a license. The idea seems to be that the company's hands are dirty and it must wash them before it can come into a court of equity. That the clean hands doctrine does not apply to the instant situation is obvious. The company could not because of its own wrong repudiate its insurance contracts with Wisconsin policyholders. It was liable on those contracts. The Wisconsin policyholders got valid insurance at the price they agreed to pay and at the price that policyholders in other states paid and at a price not in excess of the price at which it was customarily furnished by other insurance companies. The policyholders themselves, having had the benefit of valid insurance, could not recover the part of the price covered by the membership fees. The commissioner can not require return of those fees in behalf of the policyholders when they could not themselves require return. He obviously can not require it in his own right. And he can not require it in enforcement of any public right both because he is not an officer in whom the power to enforce public rights is vested and because there is no statute imposing such return as a penalty for not complying with the statutory requirement.

Recurring to the ground of the commissioner's refusal of a license first above stated, the commissioner contends that

the reserve required by sec. 201.18 (1) is to cover the overall liability of the company and that it was so decided in the former case. The company contends that this reserve is not to cover the company's overall liability, but only its liability to return to its policyholders their unearned premiums in case of cancellation of their policies; and that as in other states the membership fees are not subject to return as unearned premiums in case of cancellations in those states, there is no need or occasion to include fifty per cent of these fees in the reserve set up to secure return of unearned premiums, and that the company has fully met the purpose of the statute by setting up as an unearned premium reserve for Wisconsin members fifty per cent of the premiums paid by them and fifty per cent of the premiums paid in other states as those states construe premiums.

We unquestionably decided in the former case that membership fees exacted by the company from its policyholders are a part of the premiums paid by them, and that before the company could have a license to do business in this state it had to set aside a reserve comprising fifty per cent of what it designated as premiums and fifty per cent of the membership fees, in order to meet the requirement of sec. 201.18 (1). That statute is here set out in the margin. The company refuses to do this and seeks to justify its refusal by not exacting the membership fee from its Wisconsin policyholders but to exact from them an increase of the premiums paid by them by an amount equivalent to the membership fees exacted from policyholders in other states. Manifestly this does not meet the requirements of the statute. The statute specifically designates the amount of this reserve. It requires the designated amount to be maintained wholly independent of the company's solvency in the sense that its assets equal its overall liabilities. No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it can not have a license to do business in this state and it can not do business in this state without a license authorizing it to do it. The statute is so written and it has been declared valid, and as it is written it must be executed. We are not concerned

with the wisdom of the statute, nor with the probability of the company's meeting the obligation to refund unearned premiums out of its surplus or its contingent reserve or its other assets. We are only concerned with the carrying out of the legislative intent evidenced by it. Nor are we attempting to interfere with the manner in which the company shall do its business in other states or with the manner in which the company's contracts shall be construed in other states. The company seems to think that its constitutional rights are in some way interfered with by the commissioner's refusal to issue it a license. We are unable to perceive that any such question is involved in view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do.

We think this is all that need be said to support an affirmance of the judgment. If anything else is necessary to an understanding of this decision it may be found in the opinion of the former case.

By the Court.—The judgments of the circuit court are affirmed.

On rehearing: March 14, 1944.

The court being now sufficiently advised of and concerning the motion of the said appellant,

It is now here ordered, that said motion be and the same is hereby denied with $25.00 costs.

Sec. 201.18 (1) Reserves, basis for. The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by sec. 201.50.

No. 1064 115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

(Case No. 3)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

(Case No. 4)

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

R. M. KIESEL,
HERBERT H. NAUJOKS,
Counsel for Appellant,
State Farm Mutual Automobile Insurance Company.

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(For Jurisdictional grounds see Statement of Jurisdiction R. 13-38) 1

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The issue arises as result of a ruling of the Supreme Court of Wisconsin holding that membership fees cannot be charged by a mutual insurance company in Wisconsin 2

(Membership fee used by appellant is an initial payment required by appellant of each applicant to pay acquisition and investigation expenses of securing the new member. It is payable but once in the lifetime of each insured and is collected in addition to the premium. For detailed description of membership fee see Record 189-193.) 2

The company abandoned the membership fee in Wisconsin and adopted the straight premium plan 3

(Under the straight premium plan the uniform charge is made for insurance to include as a single item acquisition, investigation and other expenses.) 3

The company set up an unearned premium reserve upon the entire amount 3

The appellee refused to recognize this change claiming that the appellant was required under the rulings of the Supreme Court of Wisconsin to set up an unearned premium reserve in Wisconsin on all sums collected in the various states in which the appellant does business and to include as a premium both the sums collected and denominated premiums in those states and those

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Thirty-nine other states in which appellant does business however, respect the terms of the membership plan and do not require the return of membership fees or an unearned premium reserve upon such fees because under the membership contract, these fees are not returnable under any circumstances 3

The Supreme Court sustained this claim of the appellee in this case. (See *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429 (Adv. Op.).) Accordingly it held that appellant could not be licensed in Wisconsin unless it treated as a liability in other states what those states specifically held and the contract in the states provide is not a liability 4

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It would require the company to carry as a liability what the thirty-nine other states in which the appellant does business regard as an asset 5

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,
Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,
(Case No. 3) *Appellee.*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,
Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,
(Case No. 4) *Appellee.*

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

This brief is filed in reply to appellee's brief in support of his motion to dismiss or affirm. The jurisdictional grounds in support of this appeal were discussed at length in our statement of jurisdiction (R. 13-38). Therefore, we here address ourselves principally to reply to appellee's brief supplemented by some elaboration of our own brief in order to emphasize that the jurisdiction of the court here is clear and should be exercised.

I. THE NATURE OF THE CASE AND THE RULING BELOW

A. History of case and effect of ruling below.

The issue arises in this manner: The Wisconsin Supreme Court held (*Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161 (1942)), that Section 201.18 Wis. Stats. (here at issue) prohibited in Wisconsin the use of the membership fee,—an initial payment required by appellant of each applicant to pay acquisition and investigation expenses of securing the new member and payable but once in the lifetime of each insured and collected in addition to the premium, (for a more detailed description of the membership fee, its purposes and method of operation, see Complaint, Case No. 4, R. 189-193),—because under Wisconsin law as determined by the Supreme Court of Wisconsin for the first time in that case; a premium included all items of expense, whether preliminary to insurance or otherwise, by which insurance was finally acquired and performed. The court arrived at this conclusion because according to its concept of the purpose of the unearned premium reserve, that reserve was to measure the liability of the company to repay premiums collected in advance, should it become necessary for any reason to terminate the contract before its expiration date or to buy reinsurance in some other company. The court therefore held that the following provision of appellant's policy contract:

> "The membership fees set out in this policy *which are in addition to the premium* are not returnable, but entitle the named insured to insure one automobile for the coverages for which said fees were paid so long as this company continues to write such coverages and the insured remains a desirable risk" (R. 83, 190) (Emphasis ours).

was inconsistent with the Wisconsin law and could not be used in Wisconsin. The appellant accepted this construction of Section 201.18 Wis. Stats., (here at issue) and thereupon abandoned the use of the membership fee plan in Wisconsin (R. 77, 182).

Thereafter in Wisconsin it operated only on the straight premium plan; that is, the premium collected was increased after the decision above referred to so as to include as a single item acquisition, investigation and other expenses as well as all ordinary incidentals of a premium, and the same amount was collected in the initial and renewal periods of each policy. The entire sum collected under this plan was designated a premium and unearned premium reserves were set up on such sums as required by Section 201.18, Wis. Stats., as construed by the decision of the court. The appellee, however, refused to recognize this change as compliance with the Wisconsin statute as so construed by the court and claimed that in order to qualify for admission to Wisconsin the appellant was required to set up an unearned premium reserve in Wisconsin on all sums collected (both those collected on premiums and those collected on membership fees) in the other thirty-nine states in which the appellant does business.

All of these thirty-nine other states respect the terms of the appellant's policy contract above quoted, that the membership fees are not a part of the premium, that they are not returnable if the contract of insurance is cancelled before maturity and that unearned premium reserves in such states are only required and refund of premium in the event of cancellation of the insurance contract is only required of sums collected and denominated in those states as premiums. While the membership fee plan is not used in three of these states, nevertheless they accord the same effect to the contract in other states as do the states where the membership fee plan is used. Aside from Wisconsin,

the uniform interpretation is that the membership fees collected by the appellant in its almost nationwide business is that the membership fees are not premiums and are not to be so considered in computing reserves or for any other purpose. (R. 82, 140, 143-144, 147-169, 189, 192. See admissions of Answer, 221-223.)

State Farm Mutual Automobile Ins. Co. v. *Carpenter*, 87 Pac. (2d) 867 (Cal. App. 1939; Hearing denied by Cal. Sup. Ct. on April 21, 1939);

Kreifels v. *State Farm Mutual Automobile Ins Co.*, 62 N.D. 667, 244 N.W. 880 (1931);

Opinions of various State Insurance Departments and Attorneys General (R. 147-169).

Thus appellee (and his claim was sustained by the Supreme Court of Wisconsin in the cases now before this court. See *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429 (Adv. Op.)) claims that Wisconsin has the right to refuse a license to appellant because it does not treat as a premium in computing its unearned premium reserve, sums collected by it as membership fees in states where such sums so collected are not premiums and not returnable either under the contract between the company and its insured or under the law of the state where the contract is issued.

Wisconsin thus seeks to require appellant to compute and maintain an unearned premium reserve which is neither contractually or by legal interpretation the true measure of the company's unearned premium reserve liability. It seeks to force the company to treat as if subject to possible return to its policyholders in the thirty-six states where the membership plan is used, a sum which under the contracts of the company are not returnable and for which no liability, either present or potential, does or can exist.

On the other hand, parties to the insurance contracts executed in the foreign states recognizing the membership fee as no part of the premium acquired rights beyond the borders of Wisconsin. Those contracts are neither made nor are they to be performed in that state. The company's liability for unearned premiums on those contracts became fixed by the laws of those states. The amount paid as a membership fee is no part of that liability and bears no relationship to it whatever under those laws. What Wisconsin here seeks to do is to impress upon those contracts a burden not contracted for, namely, the creation of a reserve for a liability that does not exist in those states *and therefore cannot exist in Wisconsin*, and that wholly without any relation to anything done or to be done within its borders, quite similar to that which was condemned as violative of due process in *Home Ins. Co. v. Dick*, 281 U.S. 397, 407.

In 1942, the company collected membership fees of $1,630,206.39 and premiums of $24,015,786.12. In accordance with its established practice approved by all states except Wisconsin, it used only the amount collected as premiums as the base from which to compute its unearned premium reserve. It excluded the amounts collected as membership fees from all unearned premium, reserve calculations because, as indicated above, in the thirty-six states there is no liability for the return of the membership fees. Appellee would require the company to include the membership fees collected in 1942 with those premiums as the base from which it must compute its unearned premium reserve liability as of December 31, 1942. This would mean that these membership fees which were earned by the company and which are the property of the company under its contract, must in part be earmarked and held as a trust fund in the unearned premium reserve. No person who paid any of these membership fees can

be a beneficiary of the trust fund because under his contract no part of the membership fee is returnable to him. No Wisconsin policyholder could have any part of it because he paid no part of it and any liability to return premium to him is already set up because the payments he made as a premium are included in the unearned premium reserve carried by the company.

Thus is presented the question whether Wisconsin and its citizens can possibly have any interest in requiring such an unearned premium reserve liability on membership fees collected in thirty-six other states which hold that such fees are not premiums, are not returnable, and do not create a liability.

B. The case presented is one where the court must apply "settled legal principles" to the "precise circumstances" of this case. As such, it is clearly one which requires the court to assume jurisdiction in order to accord to appellant a complete hearing of the issue presented.

Settled doctrine dictates that a motion to dismiss or affirm will not be granted unless the contentions of appellant are "clearly not debatable and utterly lacking in merit,"

Hamilton v. *Regents*, 293 U.S. 245, 258;

or unless those contentions "upon mere citation of our decisions * * * may be put aside as not requiring further consideration."

Alton R. Co. v. *Illinois Comm'n.*, 305 U.S. 548, 550;
Chesebro v. *Los Angeles Co. Dist.*, 306 U.S. 459, 463.

Because the case "involves application of settled legal principles to the precise circumstances of this case"

Northwest Airlines, Inc. v. *Minnesota*, (Decided May 15, 1944) U.S. Law Week, Vol. 12, No. 44, p. 4370,

and "complicated problems raised by the interplay of federal and state power"

McLeod v. *J. E. Dilworth Co.*, (Decided May 15, 1944) U.S. Law Week, Vol. 12, No. 44, p. 4378,

it is necessary that the facts be clearly understood. We have here "a new phase of an old problem."

Northwest Airlines, Inc. v. *Minnesota*, (May 15, 1944) U.S. Law Week, Vol. 12, No. 44, p. 4370,

presenting a question which cannot be said to be "clearly not debatable and utterly lacking in merit," or one which "upon mere citation of our decisions * * * may be put aside as not requiring further consideration."

In other cases involving claimed authority by one state to regulate activities of foreign insurance corporations in other states, this court assumed jurisdiction to settle the problems there involved. It did so by applying accepted legal principles to "precise circumstances."

Hoopeston Canning Co. v. *Cullen*, 318 U.S. 313 (1943);
Osborn, et al. v. *Oslin, et al.*, 310 U.S. 53 (1940);
Fidelity and Deposit Co. v. *Tafoya*, 270 U.S. 426 (1926).

C. The premise of the Appellee on which is based his Motion to Dismiss or Affirm is not supported by the decision of the Wisconsin Supreme Court.

We appreciate that this is not the place to argue merits, but jurisdiction only. Nevertheless, it may be of assistance to the court to point out briefly, in summary, the error of appellee's basic assumptions.

The premise of appellee's motion to dismiss or affirm is that the Wisconsin court held that Section 201.18 of Wisconsin Statutes prescribes "a uniform minimum yardstick of over-all solvency that is used for comparative purposes in testing financial soundness and responsibility" (p. 9). Appellee asserts that "such reserve requirement is well within state power is definitely established by *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313" (p. 11). The Wisconsin Supreme Court decided the case upon no such premise. It said:

> "In our opinion, this section, (Section 203.12) in connection with those relating to unearned-premium reserves (Section 201.18), indicate a plain statutory purpose that the costs of furnishing insurance shall be collected by a charge known as a 'premium'; that reserves shall be set up against this premium, and that specified portions of the premium indicated in the statutory tables shall be returned as unearned upon cancellation of the insurance.
>
> "It is impossible to repel the implication from all this that the amount exacted to cover the cost of insurance shall buy insurance protection which may be so measured that the unearned portion of the premium deposit may be ascertained and returned."
>
> *Duel* v. *State Farm Mutual Auto. Ins. Co.*, 240 Wis. 161, 177-178.

To that court "over-all solvency" was immaterial:

> "The Statute specifically designates the amount of this (unearned premium) reserve. It requires the designated amount to be maintained wholly independent of the company's solvency in the sense that its assets equal its over-all liabilities. No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it cannot have a license to do business in this state

and it cannot do business in this state without a license authorizing it to do it."

> *State Farm Mutual Auto. Ins. Co.* v. *Duel*, 244 Wis. 429 at 434 (Adv. Op.).

It is not correct to speak of Section 201.18 Wis. Stats. as a general solvency statute, as "a uniform minimum yardstick of over-all solvency". It is nothing of the sort. It is a statute designed to secure an adequate reserve to cover the *unearned premium* liability of the company to its policyholders and nothing else.

> "The unearned premium reserve is sometimes called the reinsurance reserve, or the amount necessary for reinsuring the risks, but this is not the main reason for holding the reserve. The main reason for the reserve is to maintain in trust for the exclusive right of the policyholders, a sum equal to the unearned part of the premiums already collected." (*Crobaugh, Handbook of Insurance*, p. 1143 (1931)).

This is so because "the statute is so *written* (it took a court decision to determine that premium included membership fee; (*Duel* v. *State Farm*, 240 Wis. 161)) and as so *written it must be executed.*" *State Farm Mutual Auto Ins. Co.* v. *Duel*, 244 Wis. 429 (Adv. Op.) That court was not concerned "with the probability of the company's meeting the obligation to refund unearned premiums out of its surplus or its contingent reserve or other assets". It was concerned only "with the carrying out of the legislative intent evidenced by" the statute.

The Capital and Surplus Statutes (Wis. Stats. 201.03 (9), 201.32 (3), see appendix, p. 13 for text of statutes) are the only ones designed to assure over-all solvency. No claim is made that appellant does not conform to those statutes No question is or can be raised as to appellant's solvency. Appellant as of December 31, 1942 had, after

providing for all liabilities, a voluntary and unassigned contingent reserve of $4,000,000.00 (R. 187), in addition to a surplus of $8,994,982.39 (R. 187).

D. The Wisconsin Court gave only casual consideration to the constitutional questions fully presented to it.

That court was unable to see how appellant's "constitutional rights are in some way interfered with" by the refusal to relicense appellant.

> "In view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do * * *"
>
> *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429 at 434,5 (Adv. Op.).

The Wisconsin court's opinion failed to cite a single case of this court although relevant authorities of this court were cited in the briefs. It is apparent that Wisconsin begged the question here. The constitutional question here was not one of equal protection of the laws. It was one of arbitrary, unreasonable and unlawful action in a field in which Wisconsin had no interest. It was likewise one of impairment of contract and failure to accord full faith and credit to the decisions and contracts of other states. Whether the statute as construed went "beyond any legitimate interest of the state" (Holmes, J., in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435), or whether as construed it affected Wisconsin "interests as to give" Wisconsin "the power it claims" (Black, J., in *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 316) was not factually investigated or considered by that court. One can't even say that the court assumed *subsilentio* that Wisconsin gained something by the construction it placed upon that statute.

E. Had the Wisconsin Court applied the relevant facts to the accepted principles of constitutional law, it would have become evident Wisconsin had no interest to redefine what were premiums in thirty-six states which had their own definition.

Where is Wisconsin's legitimate interest in all of this? The statute is only designed to assure the discharge of a liability for an unearned premium. What interest do Wisconsin citizens have in requiring the company to set up a reserve when there is no liability for which that reserve might be used.

The company already maintains a sufficient reserve on the business done in Wisconsin and in every other state to cover the total unearned premium liability of the company in all states. Wisconsin cannot and does not dispute this proposition.

F. The Wisconsin Court's construction of Section 201.18, Wis. Stats., is in direct conflict with the principles laid down in the Hoopeston and similar decisions of this court.

The principles laid down in the cases of *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, and *Osborn* v. *Ozlin*, 310 U. S. 53, are directly violated by the Wisconsin court's construction of Section 201.18, Wisconsin Statutes, as applied to appellant. In each of those cases a legitimate state interest was present: solvency and convenience in the former (318 U. S. 313, 318); service and lessening of "risks of casualty and loss" in the latter (310 U. S. 53, 64). In the latter, this court, through Mr. Justice Frankfurter, was careful to point out that what Virginia had done was "very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state powers mat-

ters unrelated to any local interests" (p. 65). *That is the very point here.*

At the risk of repetition, we ask, what conceivable local interest does Wisconsin have in requiring the company to create and maintain a reserve for unearned premiums on insurance contracts made and to be performed in other states in excess of the liability agreed upon in those contracts and determined by the laws of those states? With much greater force does the claimed right demand denial when no question is raised as to the company's solvency and it complies with all of Wisconsin's solvency statutes!

If Wisconsin has no "legitimate interest", if its interests are not so affected as to give it "the power it claims", then we have a clear effort by the state of Wisconsin to regulate insurance contracts entered into without that state by giving extraterritorial effect to its statute, an unconstitutional assumption of power whether viewed in the light of due process (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434; *Home Ins. Co.* v. *Dick*, 381 U.S. 397, 407), full faith and credit (*Aetna Life Ins. Co.* v. *Dunken*, 266 U.S. 389, 393), or impairment of the obligation of contracts (*Ogden* v. *Saunders*, 12 Wheat 213, 357-369; *Cleveland etc. R.R. Co.* v. *Pennsylvania*, 21 L. Ed. 179, 189).

CONCLUSION

We respectfully submit that appellant has established that this court has jurisdiction in the premises, and, under the particular facts herein, should exercise its jurisdiction.

Respectfully submitted,

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Herbert H. Naujoks,
Counsel for Appellant,
State Farm Mutual Automobile Insurance Company.

APPENDIX

Sec. 201.03, Wis. Stats. Incorporation of Mutual Companies.

* * *

"(9) Any mutual insurance company after January 1, 1943 transacting automobile insurance authorized by subsection (15) of section 201.04 shall maintain a minimum surplus of $50,000 and when such surplus falls below $50,000, the commissioner shall order the surplus replaced and if not so replaced in 15 days, the commissioner may proceed against such company under section 200.08."

Sec. 201.32, Wis. Stats. Foreign Companies; admission.

* * *

"(3) A mutual company shall satisfy the requirements as to solvency and the limitations as to expenses exacted of like domestic companies."

No. 1064

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,
Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,
(Case No. 3) *Appellee.*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,
Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,
(Case No. 4) *Appellee.*

MOTION AND SUPPLEMENTAL BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

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(Case No. 4) *Appellee.*

MOTION OF APPELLANT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

Now comes the appellant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, and moves this Honorable Court for leave to file a supplemental brief in opposition to motion of appellee to dismiss or affirm (a copy of this brief together with a copy of this

motion having been served on appellee), for the reason that since the service by appellant on May 3, 1944, of its statement of jurisdiction and its statement of points to be relied upon in this appeal, and since the decision of this Court in *United States* v. *Southeastern Underwriters Association*, 322 U. S. ....; 88 L. Ed. (Ad. Op.) 1082, a new ground of constitutional objection to the action of the State of Wisconsin herein has arisen, all of which is more fully set forth in the accompanying brief.

Respectfully submitted,

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IN THE

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(Case No. 4) *Appellee.*

SUPPLEMENTAL BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

Since the service by appellant on May 3, 1944, of its statement of jurisdiction and its points to be relied upon, this Court has held that factually modern insurance business, as usually conducted, is commerce; and where it is conducted across state lines, it is in fact interstate com-

merce (*United States* v. *Southeastern Underwriters Association*, 322 U.S. ....; 88 L. Ed. (Ad. Op.) 1082). Believing that this decision adds a new issue to this appeal, we have asked leave to file this supplemental brief in opposition to appellee's motion to dismiss or affirm, pointing out herein the constitutional aspects of this new issue from a strictly jurisdictional viewpoint.

That case holding that "the business of insurance is commerce", we submit, further invalidates the decision of the Wisconsin Supreme Court when viewed in a constitutional light. At the time this appeal was taken to this Court, the law of the case required that whether the decision of the Wisconsin Court constituted an unconstitutional attempt by Wisconsin to regulate appellant be viewed in the light of due process, full faith and credit or impairment of the obligation of contracts (Orig. Br. 12). Now, for the first time, the subject must be viewed in the additional light of interstate commerce, which we here present at our earliest opportunity (*Brickerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 678).

Appellant is the largest writer of automobile insurance in the world. As of December 31, 1942, it had total admitted assets of $29,632,845.46. Its total liabilities as of that date, including a voluntary and unassigned contingent reserve of $4,000,000.00, were $20,637,863.07. As of that date, its net free surplus available for any contingency was $8,994,982.39. Its income from policyholders for 1942 on business transacted in forty states amounted to $25,645,992.51, of which $1,630,206.39 represented membership fees collected in states which recognized them as such and not as premiums. The balance represents premiums as the term is legally understood in those states where the business is transacted. All of this business is written in the following manner: Appellant receives its applications for policies by mail at its home office in Illinois.

or at its branch office at Berkeley, California, executes its policies there, mailing them direct or to the agent for delivery to the policyholders. It renews all policies by billing the policyholder direct by mail at semi-annual intervals from its home office, and the policyholder remits by mail direct to the home office, or to its branch office. It issues no new policies thereafter so long as the policyholder owns the same car, but merely issues a renewal receipt as the premium for the succeeding semi-annual period or term of the policy is paid. Obviously this business in forty states and between those states factually is an important element of interstate commerce—a great national activity, insuring the public liability for personal injury and property damage and losses for fire, theft and collision of thousands of policyholders scattered over the states while their automobiles are operated by themselves, members or their families, or persons by permission of the assured for business or pleasure anywhere in the States or Canada. Many accidents occur while the policyholder is in a state other than that of his domicile.

We appreciate, of course, that "the primary test applied by this Court is not the mechanical one * * * but rather whether, *in each case*, the competing demands of the state and national interests involved can be accommodated" (Black, J., in *U.S. v. S.E.U.A.*, 88 L. Ed. 1082 at p. 1091 or "whether the matter is an appropriate one for local regulation and whether the regulation does not unduly burden interstate commerce." (Stone, C.J., *id.* p. 1110).

Applying this test, the Wisconsin decision requires appellant to post as a reserve to satisfy its liability for unearned premiums, in addition to that which all agree to be premiums, one-half of the sum it collects as a membership fee, regardless of where collected and notwithstanding that the states in which such membership fee is collected do not consider such membership fee as a part

of the premium and notwithstanding the complete absence of any liability on the part of appellant by law or contract in such state to return any part of such membership fees so collected, to any policyholder. In 1942, appellant collected the sum of $1,630,206.39 as membership fees. A reserve on this amount under the Wisconsin decision, would have to be car-marked or posted as a reserve for a non-existent liability and would be withdrawn absolutely from commerce. It could not be taken down for use in developing the commerce of the company, for paying unusual losses anywhere in the States, or other commercial exigencies. There it rests, immobile, a Mortmain, ever alert, however, to satisfy a liability that exists nowhere.

And this notwithstanding that the Wisconsin Court held that the Wisconsin Reserve for Unearned Premium Statute (Sec. 201.18) was not a statute designed to assure over-all solvency. (Orig. Br. 8). And this notwithstanding the further fact that appellant does not operate on the membership fee plan in Wisconsin, but posts 50% of all premiums from Wisconsin as the term is defined by the Wisconsin Court as a reserve for its unearned premium liability in Wisconsin. And this in a case where no one claims that appellant does not conform to the Capital and Surplus Statutes of Wisconsin, being the ones designed to assure over-all solvency, and no question is or can be raised as to appellant's solvency. (Orig. Br. 9). And this in a case where no legitimate local interest is present. (Orig. Br. 11, 12).

This illustrates the jurisdictional question involved. We appreciate fully the admonition of this Court in the *S.E.U.A.* case that "the precise boundary between national and state power over commerce has never yet been and doubtless never can be delineated by a single abstract definition." (Black, J. *id.* p. 1092). We, therefore, submit that the determination of whether the competing demands of

the state and national interests involved can be accommodated, whether the matter is an appropriate one for local regulation and whether the regulation does not unduly burden interstate commerce requires "a consideration of all the relevant facts and circumstances * * * which can only be made upon a case to case basis". (Stone, C.J. *id.* p. 1110).

CONCLUSION.

We again respectfully submit that this Court should exercise its jurisdiction herein.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF APPELLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION.

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BRIEF OF APPELLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN, Opinion in 244 Wis. 429. (R. 135).

This appeal was filed in this Court June 1, 1944 from a final judgment of the Supreme Court of the State of Wisconsin, a court of last resort. (Entered January 18, 1944. Rehearing denied March 14, 1944. R. 134, 140.)

This judgment affirmed a judgment of the Circuit Court of Dane County, Wisconsin which dismissed the complaints in two actions brought by appellant to enjoin the appellee as the Commissioner of Insurance of the State of Wisconsin from interfering with the business, agents and members of the appellant in Wisconsin, and as incidental thereto, to require the said Commissioner of Insurance to issue to the appellant and its agents, licenses as prescribed by law for the license years beginning May 1, 1942 and May 1, 1943. The cases were consolidated and heard as one case and have been so consolidated for the purposes of this appeal.

I—JURISDICTIONAL GROUNDS.

The jurisdiction of this Court to entertain the present appeal is based upon Section 237(a) of the Federal Judicial Code (28 U.S.C.A. Sec 344(a)) and Rule 46 of the Rules of this Court, and involves the validity of Section 201.18 of the Wisconsin Statutes as construed and applied, the Wisconsin Supreme Court, the highest court of that state having held such statute valid and not repugnant to the United States Constitution as a denial of due process, full faith and credit, or impairment of the obligations of contracts, the applicability of the commerce clause not being involved under the existing law of this Court at the time the judgment of the Supreme Court of Wisconsin became final.

Said judgment is challenged in this Court in the following particulars:

(a) It violates the Commerce Clause, Article I, Section 8(3) of the Constitution of the United States;

(b) It denies to the appellant due process of law in violation of Section I of the Fourteenth Amendment to the Constitution of the United States;

(c) It denies full faith and credit to the public acts, records and judicial proceedings of other states of the Union, in violation of Article IV, Section 1 of the Constitution of the United States;

II—STATEMENT OF THE CASE.

The immediate controversy here at issue, arises out of the refusal of appellee as Commissioner of Insurance of the State of Wisconsin to renew the license of the appellant and its agents to transact the various forms of automobile insurance in Wisconsin for the license years beginning May 1, 1942 and May 1, 1943. In order to more readily understand the present controversy, it will be helpful to sketch briefly the manner in which appellant does business and the history of this and related litigation.

The company was originally licensed in Wisconsin on July 13, 1939, to transact all forms of automobile insurance on the life membership fee plan by the then Insurance Commissioner of that state. That license expired May 1, 1940 and renewal has been refused ever since.

The appellant, State Farm Mutual Automobile Insurance Company (hereinafer sometimes referred to as the "company"), is incorporated and does business under the laws of the state of Illinois, with its home office at Bloomington in said state, (R. 10, 16, 30). It began business in 1922 and since organization has continuously written all forms of automobile insurance on the less hazardous types of risks on the mutual plan. (R. 16, 20). It is licensed to do business in thirty-nine states, territories and districts outside of Wisconsin. (R. 16, 100). It has a distinct plan of operation which is used in Wisconsin when it was admitted to that state in 1939 and which it still uses in all states excepting Wisconsin, Arizona, Louisiana and Texas. (R. 14, 19-21, 27, 104-106).

Section 1 of Article VII of the by-laws of the company reads as follows:

> "Membership fees for the different kinds of insurance transacted by the corporation may be fixed in such amounts and upon such conditions as ordered by the Board of Directors and set out in the policy." (R. 104).

Pursuant to that by-law it charges each new member a life membership fee. This fee is required but once in the lifetime of each applicant and entitles the insured to insure against the coverage or hazard for which the membership fee was paid throughout his lifetime, provided he remains a desirable risk. (R. 104-105). This fee is used to reimburse the company for the expense incurred in investigating the moral and physical characteristics of the proposed member and to pay the other expense in acquiring the member. (R. 105).

All policies issued by the company in all states except Wisconsin, Arizona, Louisiana and Texas contain a special provision pursuant to the above by-law which reads as follows.

> "The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for the coverages for which said fees were paid so long as this company continues to write such coverages and the insured remains a desirable risk." (R. 104).

As stated in the contract between the company and the policyholder, the membership fees are in addition to the premiums, constitute no part of the premiums and furnish no insurance protection. (R. 104-105). Separate premiums are collected in consideration for the insurance protection furnished by the company. (R. 105). The premiums in this company are for terms of six months each. (R. 105).

The insurance contract specifically provides that the life membership fees are not returnable but the premiums having been prepaid for a six months term, are returnable in whole or in part if the insurance is cancelled either by the policyholder or by the company prior to the expiration of the current policy term. The real distinctive feature of the plan of this company is in the use of the separate life membership fee which gives a life option to the insured to purchase insurance at a saving of from twenty to thirty-five per cent of the usual cost. (R. 20, 105). Most other companies charge a straight premium and do not require a separate and additional life membership fee. (R. 36).

When the company sought renewal of its license for the license years ending May 1, 1940 and May 1, 1941, renewal was refused on the ground that the life membership fee plan was not legal for use in Wisconsin. Litigation ensued which resulted in the decision of *Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161; 1 N.W. (2d) 887; rehearing denied March 13, 1942; 2 N.W. (2d) 871. This decision reversed the finding made by the Insurance Commissioner of Wisconsin in 1939 and held that the life membership fee plan as used by the company was not permissible in Wisconsin. The Wisconsin Court held that the term "premium" under the Wisconsin statutes, included all items of expense in connection with the insurance business whether preliminary to insurance or otherwise by means of which insurance is finally acquired and performed. That Court so construed Section 201.18 Wis. Stats. as to make the use of the membership fee plan inadmissible in Wisconsin. The company accepted that construction of Section 201.18 Wis. Stats., and thereupon as of April 27, 1942, abandoned the use of the membership fee plan in Wisconsin and has never since used that system in that state. (R. 14, 98).

The company thereupon and throughout the license years involved in this litigation, operated only on the standard premium plan in Wisconsin; that is, the premium collected covered all cost of investigation, acquisition and also all loss and other expense in a single premium. (R. 14, 98). The company having complied with the Court's opinion, then applied for renewal of its license but this was refused for reasons hereafter stated and thereupon further litigation resulted involving the license years beginning May 1, 1942 and May 1, 1943 which culminated in the decision of *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429, from which this appeal was taken. The Court in that decision construed Section 201.18 Wis. Stats., as requiring the company as a condition to obtaining a license to set aside a reserve comprising fifty per cent of the membership fees collected by it in all states; this in addition to the usual fifty per cent reserve on the premiums collected by it in all states which latter reserve has been maintained by the company at all times. The purpose of the unearned premium reserve is to make certain that the company will have on hand at all times sufficient funds to make refund to each policyholder of the unearned portion of the premium in the event of cancellation of the policy during the current term or to reinsure the insurance liabilities of the policyholders for the balance of the current term of each in some other company. Section 201.18, Wis. Stats.

The life membership fee plan is used only in those states where the same is lawful and each insurance contract issued there provides that the life membership fee is not returnable. (R. 104). The company resisted the demand for this additional reserve on the membership fees by appellee, as Insurance Commissioner of Wisconsin, on the ground that the membership fees were no part of the premium and that there was no liability of the company in

any event which justified any reserve whatever for unearned premiums or otherwise. (*State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429). The company also contended that the requirement of this additional reserve had the effect of locking up or freezing a large sum of money in a reserve for which there was no just or sound reason and which had the effect of depriving the company of the use of its own assets and impairing the soundness of the company to the detriment of its own members. Wisconsin policyholders could not benefit from this additional reserve because under the decision in 240 Wis. 161, they could not be parties to the life membership fee plan. It could not benefit policyholders of other states who had paid a life membership fee for the reason that by the terms of their policy contracts, they had expressly waived any right to the return of such membership fees. Such reserve was a detriment not only to Wisconsin policyholders but to policyholders everywhere for the reason that funds in such reserve were to be withdrawn from the free assets of the company and could not thereafter be used for the payment of losses or for dividends to policyholders or to protect against asset fluctuations or to cover any contingency of any other kind. It was a fund dedicated to a purpose which could never be realized and the company took the position that under this state of facts, Section 201.18 as construed by the Wisconsin Supreme Court violated the Constitution of the United States on the grounds stated in (b) and (c) of *I* of this brief and hereafter developed.

As previously stated, the company does business on the life membership fee plan in every state where it operates excepting Wisconsin, Arizona, Louisiana and Texas. (R. 19; 104). The states of Arizona, Louisiana and Texas do not permit use of the plan but hold that since no liability exists, no unearned premium reserves are required on life membership fees wherever collected. Wisconsin alone holds

that such reserves are required and on business done entirely outside of that state. (R. 62-89). The company has been repeatedly examined by various insurance departments of the United States over a long period of years and those examiners have consistently held that unearned premium reserves are not required on the life membership fees. (R. 16, 17, 103).

The importance of this issue arises from the fact that this company does business in most of the states of the Union and is the largest exclusive writer of automobile insurance in the world. (R. 54). As of December 31, 1942, it had total admitted assets of $29,632,845.46. (R. 102). Its total liabilities as of that date including a voluntary and unassigned contingency reserve of $4,000,000.00, were $20,637,863.07. (R. 102). As of that date, its net free surplus available for any contingency was $8,994,982.39. (R. 102). (Bests, Reproduction of Principal Schedules from Casualty and Surety Statements 1943, p. 975, item 58; p. 976, items 48 and 51.) Its total income from policyholders for 1942 amounted to $25,645,992.51 of which $1,630,206.39 represented life membership fees collected from new members in states which recognized these fees as such and not as premiums. (Bests, Reproduction of Principal Schedules from Casualty and Surety Statements 1943, p. 978, item 1, p. 973, item 20.) During the year ending December 31, 1943, the company collected from its policyholders a total of $26,392,840.56 of which $2,582,735.40 represented life membership fees. (Bests Reproduction of Principal Schedules from Casualty and Surety Statements 1943, p. 973, item 19; 1944, p. 1153, item 1, p. 1148, item 19.) The controversy is as to whether or not additional unearned premium reserves may lawfully be required by appellee for the license years in question on such membership fees collected entirely outside of Wisconsin.

The actual mechanics by which the insurance business of the company is carried on is briefly as follows: All

policies, including those containing the life membership contract, are issued by the company at its home office. The agents do not issue policies. All policies are renewed by mail, the company billing the policyholder direct and the policyholder mailing his renewal premium direct to the company. (R. 106). The company does not issue a new policy for each term of insurance but renews the existing policy. (R. 106).

The company began to write business in Wisconsin about January 1, 1940 and notwithstanding litigation, the business steadily increased until the company on or about May 1, 1943 had in excess of 25,000 policies in force in that state with an annual premium income in excess of $400,000. (R. 108). Over $25,000 was invested in building the Wisconsin agency plant and it now has more than 500 producing district and local agents. (R. 108-109).

III—ASSIGNMENTS OF ERRORS.

A. The Supreme Court of the State of Wisconsin erred:

1. In failing to hold that Section 201.18 of the Wisconsin Statutes as construed and applied to appellant, an Illinois corporation, under the existing facts, was invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States as affecting contracts and operations of the appellant beyond the jurisdiction of the State of Wisconsin.

2. In failing to hold that Section 201.18 of the Wisconsin Statutes as construed and applied to appellant, an Illinois corporation, under the existing facts, was invalid and void as in violation of the full faith and credit clause, Article IV, Section 1 of the Constitution of the United States.

B.—The business conducted by appellant in forty states, the District of Columbia and the Dominion of Canada is

commerce and, under the decision of this Court in the case of *The United States* v. *South Eastern Underwriters Association*, 322 U. S. 533, 88 L. Ed. (Adv. Ops) 1082 rendered after the Wisconsin judgment became final, a new issue has been added to this appeal, namely, whether Section 201.18 as construed by the Supreme Court of Wisconsin and applied by appellee violates the Commerce Clause of the United States Constitution, Article I, Section 8(3).

IV—MATERIAL CONSTITUTIONAL AND STATUTORY PROVISIONS.

The constitutional provisions here involved are as follows:

Article I, Section 8(3), United States Constitution, which provides in part:

> "Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes; * * *"

Article XIV, Section 1, United States Constitution, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV, Section 1, United States Constitution which provides:

> "Full Faith and Credit shall be given in each state to the public Acts, Records and judicial Proceedings of

every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Section 201.18 of the Wisconsin Statutes, which provides:

"Reserves, basis for. (1) The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by section 201.50.

"(2) Where no other provision is made therefor by law, the reserves of any insurance company shall be calculated upon such basis, method and plan as shall fully provide for all liabilities, and any basis, method and plan fixed by the order of the commissioner shall be prima facie just, reasonable and proper."

ARGUMENT.

I.

The Statute of Wisconsin as construed and applied by its highest court violates the Commerce Clause, being Article I, Sec. 8(3) United States Constitution.

United States v. *South-Eastern Underwriters Association*, 322 U.S. 533, hereinafter referred to as S.E.U.A., decides that the modern insurance business is commerce and that where such business is conducted across state lines, it is in fact interstate commerce. This decision was rendered after the judgment of the Supreme Court of Wisconsin became final and during the time this appeal was being perfected. The Court will recall that we urged this point in a Supplemental Brief in opposition to appellee's motion to dismiss or affirm and prior to the time that this Court noted probable jurisdiction. We therefore submit that this issue is properly before this Court inasmuch as we presented it at our earliest opportunity (*Brinkerhoff Co.* v. *Hill*, 281 U.S. 673, 678). Certainly the issue was not in the case prior to this Court's determination in S.E.U.A. However, in the event that this Court should not deem the constitutional issues raised in the state court, namely, due process and full faith and credit, determinative of the case, and that in the present record, this question of commerce cannot be passed upon at this time, we submit that the judgment appealed from should be vacated and the cause remanded for further proceedings to enable the state court to pass upon the issues (*Walling* v. *Reuter Co.*, 321 U.S. 671, 676). The statement of facts clearly indicates that appellant is engaged in interstate commerce.

Employing the perspective of interstate commerce, the sole issue is whether appellant, as a condition of doing business in Wisconsin, can be required to conduct its business beyond the borders of Wisconsin in the same manner as Wisconsin requires that business to be conducted within its borders. Thereby is presented the question whether Wisconsin can project its legislation extra-territorially and thereby require national conformance to its policy without doing violence to the Commerce Clause. Readily suggested is the fact that if Wisconsin can do so, any one of the other states may do likewise. The result of such doctrine is immediately apparent. Any one of the other states could, with equal right and greater reason, revoke appellant's license therein because of its compliance with Wisconsin's demands as at variance with its own local policies and prejudicial to its citizenry. Thereby, a corporation engaged in a great national activity such as appellant, finds its interstate activities compressed and circumscribed to areas where the rules are identical. Thus are created various doctrines of various states, not only as to how such business is to be conducted in those states, but how such business is to be conducted nationally as a *sine qua non* to conducting business in those states. Thus, we create the Wisconsin rule, the New York rule, the Illinois rule with their attendant inflexibilities and rigidities. National conformance to a particular state standard or policy as a condition of doing an interstate business in a particular state, creates insulated chambers wherein interstate commerce suffocates in parochial isolation. Thereby is frustrated and defeated that great Clause,—placed there to prevent the States from impeding the free and easy flow of commerce among them. Thereby "the mutual jealousies and aggressions of the states" take form in economic reprisals and extra-territorial legislation which the insurance business, under the heretofore factually false

doctrine of intrastate commerce, presents in high relief. (See Appendix IA, Status As to State Retaliatory Laws, C. C. Fraizer, Director of Insurance of Nebraska, Chairman of the Laws and Legislative Committee of National Association of Insurance Commissioners, The Eastern Underwriter, Dec. 8, 1944, R. 45; Appendix IB, Citations to Various Retaliatory Provisions of the Several States, R. 53.)

The answer to the basic question before this Court lies in a clear understanding of the facts. The key to the problem is in the definition of the word premium. Inherent in the life membership fee plan is the substance that the membership fee is not a premium, nor a part thereof. Once this concept of this membership fee plan is laid aside and the membership fee becomes a part of the premium, the result is a straight premium plan. No one can or does dispute this basic doctrine.

Observe that the cornerstone of Wisconsin's case lies also in the concept of premium. If the membership fee is not a part of the premium, then obviously no reserve is required under the Wisconsin Statute. Remember that we do not here dispute Wisconsin's right to define what shall constitute a premium as to business conducted in Wisconsin. The question, therefore, resolves itself in an attempt by Wisconsin to define what shall constitute a premium on all business done everywhere irrespective of whether the concept of premium is the same in the states where the business is conducted as that of Wisconsin. This premise is irrefutable as the basis for the reserve demanded by Wisconsin lies solely in the collection of a premium. Thus, under Wisconsin doctrine, a membership fee collected in California, recognized as such in that state, there recognized as no part of the premium (*State Farm Mutual Automobile Ins. Co.* v. *Carpenter*, 87 Pac. (2d) 867), there incurring no liability on the part of the Com-

pany for a return of any part thereof, there recognized as belonging absolutely to the Company, as compensation or reimbursement for acquisition expense, becomes a premium requiring the setting aside of 50% thereof as an "unearned premium or reinsurance reserve" (Sec. 201.18, Wis. Stats.) in the face of the incidents arising under the law of the state where the business is transacted. The same is true of the other 35 states which recognize the membership fee as not a part of the premium.

It would seem that the statement contains its own refutation, yet precisely such is the case at bar. Now how does this Wisconsin doctrine operate? In 1942, appellant collected the sum of $1,630,206.39 as membership fees in the states where the membership fee is recognized as such and not as a part of the premium. A reserve on this amount under the Wisconsin decision, would have to be earmarked or set aside as a reserve for a non-existent liability and would be withdrawn absolutely from commerce. What is the appellant's unrestricted and absolute property in those states is, by Wisconsin's determination, converted into a "trust fund for the benefit of policyholders" (Crobaugh, Handbook of Insurance, p. 1143) in those states to secure a liability non-existent there. It could not be taken down for use in developing the commerce of the Company, paying unusual losses anywhere in the states, or other commercial exigencies. There it rests, immobile, a Mortmain, ever alert, however, to satisfy a liability that exists nowhere.

And this notwithstanding that the Wisconsin Court held that this statute (Sec. 201.18 Wis. Stats.) was not a statute designed to secure overall solvency. Specifically the Court said (R. 138):

> "The statute specifically designates the amount of this reserve. It requires the designated amount to be maintained wholly independent of the Company's sol-

> vency in the sense that its assets equal its overall liabilities. No matter by how much the assets of the Company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it cannot have a license to do business in this state and it cannot do business in this state without a license authorizing it to do it. The statute is so written and it has been declared valid, and as it is written it must be executed."

And this notwithstanding the further fact that appellant does not operate on the membership fee plan in Wisconsin, but sets aside 50% of all premiums on business transacted in Wisconsin as the term is defined by the Wisconsin Court as a reserve for its unearned premium liability in Wisconsin. And this in a case where no one claims that appellant does not conform to the Capital and Surplus Statutes of Wisconsin (Wis. Stats. 201.03(9), 201.32(3)) being the ones designed to insure overall solvency, and no question is or can be raised as to appellant's solvency. See Appendix II for text of these statutes. Appellant as of December 31, 1942, had, after providing for all liabilities, a voluntary and unassigned contingent reserve of $4,000,000.00 (R. 102) in addition to a surplus of $8,994,982.39 (R. 102).

Thus is presented the frequently recurring problem of the power of the states over interstate commerce in the absence of Congressional action. Here is presented for the first time that problem as applied to the business of insurance when conducted across state lines. Beginning with *Cooley* v. *Port Wardens*, 12 How. 299, and continuing down to S.E.U.A., 322 U. S. 533, whatever may have been the language employed, this Court has recognized that the problem resolves itself into the question of accommodating "the competing demands of the state and national interests." The touchstone is not in the application of a mechanical formula or catchword. It is found in an application of the law to economic reality and the overmastering

requirement that one State cannot in its dealings with another place itself in a position of economic isolation.

Thus, if Wisconsin is to live with Illinois under the aegis of the Commerce Clause, designed to protect the national commerce and therefore the commerce of both, Wisconsin cannot and should not be permitted to prevent Illinois enterprise from entering Wisconsin under the guise of state interest, if none in fact appears. Conversely, the same is true of Illinois. Inherent in the doctrine of accommodating the state and national interests is the presence of a legitimate state interest. While we are admonished by unimpeachable and venerable authority that the life of the law is not logic but experience, the fact that a thing logically follows does not therefore establish its inapplicability or invalidity. Therefore, if no legitimate state interest is present and the result as construed and applied by the highest court of the state is legislation projected extraterritorially to the detriment of the free and easy flow of commerce among the several states, the answer must be one of proscription.

Therefore, we search for a legitimate state interest. We are abundantly advised. *California* v. *Thompson*, 313 U. S. 109, involving transportation, teaches us that the States may in many particulars, *in matters of local concern*, regulate "without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause" (313 U. S. 109, 113). Therein is collected and cited numerous cases illustrative of the doctrine and no useful purpose would be served in marshalling them here. These regulations were valid "*because of their local character*" (*id, emphasis supplied*). We search in vain there for an apposite here. In the main they dealt with regulations of a state relating to the operation of railroads

to protect the safety of its citizens, local quarantine laws to protect local health, the safe and convenient use of its harbors and inspection laws and regulations applicable to articles of interstate commerce designed to protect its citizens from fraud provided such regulations neither discriminated against nor substantially obstructed the commerce. In each case a legitimate state interest was present.

South Carolina State Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177, another transportation case, impresses upon us the particular local concern which a state has over the highways it constructs and the extent to which this Court will protect that legitimate local interest, in the absence of Congressional legislation, even though the regulation materially interferes with interstate commerce. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, reminds us that the interstate character of a business does not give it immunity from all state regulation and thereby deprive the state of the power to protect the special interest brought into play by such company's "pursuit of its share in the comprehensive process of foreign commerce." (322 U. S. 202, 212). Certainly neither of these cases is apposite here.

We are further reminded by S.E.U.A. that "the precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition" (Black, J. 322 U. S. 533, 550), but observe that running through all of these cases is the vein of legitimate local interest,—necessary to be safeguarded. Observe the absence of any effort to give the legislation extra-territorial effect. Observe the absence of an attempt to determine the policy or practice of another state or to determine how interstate commerce is to be conducted there. Observe the absence of any attempt to redefine, alter or burden the character of transactions occurring elsewhere.

Thus we have found many illustrations of legitimate state interest, none of which support Wisconsin here. What do we find in the field of proscription, with particular reference to those cases where the legislation sought to regulate the commerce outside the territorial limits of the legislating state? First we have that great case of *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557, wherein this Court struck down state legislation frankly aimed to regulate the rate on the state segment of an interstate shipment as violative of the Commerce Clause. Here was a direct attempt by Illinois to project its legislation beyond its borders. Chief Justice Waite, dissenting with two members of his Court, upon the authority of *Peik* v. *C. & N. W. R. Co.*, 94 U. S. 164, argued that the legislation was valid, quoting from the *Peik* case (118 U. S. 557, 592, 593):

> "'As to the effect of the statute as a regulation of interstate commerce, the law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company had domestic relations. Incidentally, these may reach beyond the State. But certainly until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without.'"

Observe that the dissent only claimed the legislation valid upon the premise of "domestic concern."

But the majority through Mr. Justice Miller, said: (118 U. S. 557, 577)

> "Of the justice or propriety of the principle which lies at the foundation of the Illinois Statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State, it may be very just and equitable,

> and it certainly is the province of the State Legislature to determine that question. "But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated."

And so in the case at bar. When constitutional sanction under the Commerce Clause is had for the doctrine that each state may define a premium, a reserve, a liability, or the multitude of other concepts arising from the insurance business, not only on business conducted within its borders, but elsewhere, and compliance therewith requisite to commercial enterprise within it, the fertile field of insurance, now supporting its massive oaks and luxuriant foliage, as S.E.U.A. so graphically illustrates (322 U. S. 533, 540), will shortly become a sandy and arid plain "interspersed here and there with thin and scanty groves of pine."

Coming to *Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S. 204, we find this Court declaring, as violative of the Commerce Clause, a statute of Kentucky regulating the toll on a bridge across the Ohio River because "it is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state" (154 U. S. 204, 220).

And now we come to *Baldwin* v. *Seelig*, 294 U. S. 511, which we submit is controlling here. Arraying the economic interests of certain of its citizens in grandma's garments of a regular and adequate supply of pure and

wholesome milk for its citizens, New York sought to sustain a statute which prohibited the sale of imported milk within its borders unless the initial price paid therefor equalled the price paid for a like transaction within the state. Notwithstanding its innocuous raiment, its protestations that its big eyes were to see better, its big ears to hear better, the statutory wolf was recognized by its big teeth—teeth which sought to reach out beyond the borders of New York and devour the farmers of Vermont and adjacent states. Here was a direct attempt to project legislation extra-territorially. What essential difference is there in the attempt of New York to nullify the price of milk in Vermont and that of Wisconsin to nullify the meaning of premium in California and 35 other states?

Through Mr. Justice Cardozo, a unanimous Court said (294 U. S. 511, 527):

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the nobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin."

Thus we find no instance where this Court has permitted extra-terrtorial effect to state legislation affecting interstate commerce. Beyond a state's borders lies forbidden territory, the bailiwick of another of equal dignity and power, recently emphasized by *McLeod v. Dilworth Co.*, 322 U. S. 327. There Arkansas was denied the right "to project its powers beyond its boundaries and to tax an inter-

state transaction" (p. 911), for, to rule otherwise, would defeat "the very purpose of the Commerce Clause" designed "to create an area of free trade among the several states" (p. 912). Equally enervating to free trade is Wisconsin's egocentricity.

The argument begets greater force when you consider the complete absence of a legitimate local interest. What Wisconsin interest is served by the statute as construed and applied by its highest Court? We are advised of none in its opinion. The question of legitimate state interest was pertinent to our claim of a denial of due process and relevant authorities such as *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435, per Holmes, J., were cited in our brief, but our argument was answered with the following (R. 139):

> "The company seems to think that its constitutional rights are in some way interfered with by the commissioner's refusal to issue it a license. We are unable to perceive that any such question is involved in view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do."

The Court expressly negatived any solvency interest (R. pp. 138, 139). The question of legitimate state interest was not factually investigated or considered by that Court. One can't even say that it assumed *sub-silentio* that Wisconsin gained something by the construction it placed upon that statute.

Consideration of the matter clearly discloses no legitimate Wisconsin interest. In fact the contrary appears. Certainly Wisconsin can have no legitimate interest in requiring the Company to set up an unearned premium reserve on membership fees collected outside of Wisconsin when no such liability exists. No person who paid any

of these membership fees outside of Wisconsin can be a beneficiary because under his contract no part of the membership fee is returnable to him. No Wisconsin policyholder could have any part of it because he paid no part of it and any liability to return premium to him is already set up as a reserve conformably to the Wisconsin Statute because all payments he made are considered premium and included in unearned premium reserve carried by the Company. Thereby is created a situation whereby the Company is required to set aside a large sum as a reserve to meet a non-existent liability. As we have heretofore indicated, it could not be taken down for use in developing the commerce of the Company, to meet unusual losses occurring anywhere, or for other commercial exigencies. Instead of promoting solvency, its only tendency would be to precipitate insolvency, because, if liquid as it should be, instead of frozen as it would be, it might be applied to avert insolveny in exigent economic circumstances. That Wisconsin policyholders could have no interest in it is clearly evident from its nature.

> "The unearned premium reserve is sometimes called the reinsurance reserve, or the amount necessary for reinsuring the risks, but this is not the main reason for holding the reserve. The main reason for the reserve is to maintain in trust for the exclusive right of the policyholders, a sum equal to the unearned part of the premiums already collected." (*Crobaugh, Handbook of Insurance*, p. 1143 (1931)).

It seems to us quite evident that no legitimate purpose is served in requiring a reserve to secure a contingent liability in the absence of a contingent liability.

The doctrine of the Supreme Court of Wisconsin has, however, sinister implications. This record shows that appellant, doing business on the membership fee plan since 1922, the date of its incorporation, not only has risen to its pre-eminent position in the industry, but has sold its insurance at rates from 20% to 35% less than the so-called

conference rates. The reasons therefor are pleaded in its complaint and admitted in the record (R. 20, 21). It is, of course, impossible for a Wisconsin company to operate upon this membership fee plan not only in Wisconsin but elsewhere, because Wisconsin, not recognizing the membership fee plan (*Duel* v. *State Farm Mut. Auto. Ins. Co.*, 240 Wis. 161), will not charter a company doing business on that basis. Are we impertinent when we suggest that the real reason behind Wisconsin's refusal to relicense appellant lies in its desire to protect its own companies not only from competition in Wisconsin but elsewhere? We know of no other reason for the determination and we are advised of none by Wisconsin's court, except its statement that its opinion was sound because it operated alike upon all insurance companies doing business in Wisconsin. In effect Wisconsin is insulating its insurance citizens against worthy competition not only in Wisconsin but elsewhere, to the detriment of the vast majority of its other citizens who desire to purchase responsible low cost insurance.

We must remember also that we are not dealing with a plain and unambiguous statute of Wisconsin clearly evincing its policy. It took a court decision to determine that premium included membership fee collected in Wisconsin (*Duel* v. *State Farm*, 240 Wis. 161) and it took the instant decision to determine that premium meant membership fees collected everywhere in face of the laws of the state where collected so that Wisconsin's reserve for unearned premium statute could be applied to require a reserve for a nonexistent liability and thereby preclude relicense of appellant. While the *Barnwell* case, 303 U. S. 177, sustained state legislation relative to the use of the highways of South Carolina, the opinion contained a very authoritative and informatory note relative to state control over interstate commerce in the absence of Congressional legislation

(303 U. S. 177, 185, Footnote 2). Stated there is the following rule:

> "State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted (citing numerous cases).
>
> "Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interest within the state. (citing numerous cases)"

The relevancy of the note is obvious. It seems clear to us that the only purpose of the construction placed upon the statute by the Wisconsin Court is to gain for those companies within the state not doing business on the membership fee plan, an advantage at the expense and burden of those without the state without any showing of any advantage to any citizen within the state except those citizens who may be competitors of appellant.

Boiled down to its essentials, the case is another *Baldwin* v. *Seelig*, insurance instead of milk, presented here denuded of the raiment of local interest but premised solely upon its equal operation on all in Wisconsin. The equal operation on all in New York did not save Mr. Baldwin and it should not save Mr. Duel. In characteristic style, Mr. Justice Cardozo, delivering this Court's unanimous opinion, said (294 U. S. 511, 521):

> "New York has no power to project its legislation into Vermont by regulating the price to be paid in that

state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

"Such a power, if exerted, will set a barrier to traffic, between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a state 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. I, Sec. 10, clause 2; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, Sec. 8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112, 54 L. ed. 678, 687, 30 S. Ct. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, and see *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 14 S. Ct. 829, 4 Inters. Com. Rep. 658; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 S. Ct. 1091; *Webber* v. *Virginia*, 103 U. S. 344, 351, 26 L. ed. 565, 567; *Kansas City S. R. Co.* v. *Kaw Valley Drainage Dist.*, 233 U. S. 75, 79, 58 L. ed. 857, 859, 34 S. Ct. 564. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition

between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; the Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, Sec. 259. If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

"The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, *supra*. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy

> end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

(See also the concurring opinion of Mr. Justice Jackson in *Duckworth* v. *Arkansas*, 314 U. S. 349, 401-402).

Contrast the absence of legitimate local interest with the presence of national interest. Insurance, we are informed "holds a commanding position in the trade and commerce of our nation" having "become one of the largest and most important branches of commerce" with "total assets approximately the "equivalent of the value of all farm lands and buildings in the United States". Its annual premium receipts exceed "more than the average annual revenue receipts of the United States Government during the last decade". In it are 524,000 experienced workers, "almost as many as seek their livings in coal mining or automobile manufacturing". No modern enterprise directly affects more persons in all walks of life. It "touches the home, the family and the occupation or business of almost every person in the United States" (per Black, J. in *U. S.* v. *S. E. U. A.*, 322 U. S. 533, 88 L. Ed. 1082, 1086, 1087).

Coming specifically to the business of automobile insurance consideration is immediately focused upon its fluidity. A car insured in New York is invited to use nationally supported highways. It may be in New York today, in Ohio tomorrow, and in Illinois the day following. This swiftly moving traffic may be and often is involved in an accident in any state. The need for prompt investigation and settlement or contest of claims arising therefrom is of extreme interest to the persons involved as well as the body public in general. The national interest demands the opportunity to enjoy the greatest possible convenience and

service under the insurance contract anywhere. Large companies like appellant have service agencies scattered through various cities in the states wherein the business is conducted, affording prompt relief to persons whose body or property may be injured or damaged in the never ending payment for the tempo and complexities of modern life.

Thus clearly demonstrated is the admonition that "the actualities of life do not lend themselves to scrupulous insulation of disparate interests" (Frankfurter, The Commerce Clause, p. 21). If the Commerce Clause is to continue to be a great "unifying force", if we "must sink or swim together", Wisconsin's provincialism must yield to the urbanity of reality, or "48 distinct territorial compartments" will continue to "function in isolation from each other" (per Black, J. in *U. S.* v. *S.E.U.A.*, 322 U. S. 533, 541) with their ever mounting retaliations and reprisals. (Appendix I (A)(B), R. 45, 53).

II.

The Statute of Wisconsin as construed and applied by its highest court denies appellant due process in violation of the 14th Amendment.

Relevant recollection reminds us that appellant initially entered Wisconsin pursuant to a license which gave approval to its life membership fee plan. Thereupon, it began business there. At the time of the acts complained of herein, it had established in Wisconsin an administrative office. It had in Wisconsin approximately 500 agents, 25,000 risks in force, with an annual premium income therefrom in excess of $400,000.00 and it had, in creating and developing this business, expended moneys in excess of $25,000.00 (R. 108, 109). Thereby it became a person

within the aegis of the due process clause (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434) and entitled to its protection "against a subsequent application to it of state law" (*Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 80).

At the outset, from the standpoint of due process, we agree that Wisconsin may lawfully prescribe the method or manner in which business is to be done therein and both domestic and foreign corporations must comply therewith. Wisconsin may also lawfully prescribe the conditions for admission of a foreign company but due process "denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state as an attempt to exercise power over a subject matter not within its constitutional jurisdiction." (*Alaska Packers Assn.* v. *I.A.C.*, 294 U. S. 532, 540). Likewise we regard it as settled authority that a state may not use its power to exclude foreign corporations from local business as a means of controlling the operations or contracts of such foreign corporations in other states (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426), excepting only in those situations where the local legislation is essential for accomplishing genuinely legitimate local purposes for the protection of its own citizens. (*Osborn* v. *Ozlin*, 310 U. S. 53; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313.)

With these principles in mind, we find that thirty-nine states respect the terms of appellant's policy contract that membership fees are not a part of the premium, that they are not returnable if the contract of insurance is cancelled before maturity and that unearned premium reserves in such states are only required on sums collected and denominated in those states as premiums. While the membership fee plan is not used in three of these states, nevertheless they accord the same effect to the contract in other states as do the states where the membership fee plan is accepted.

Aside from Wisconsin, the uniform interpretation is that the membership fees collected by appellant in its almost nationwide business, are not premiums and are not to be used in computing unearned premium reserves or any other liability. (R. 21, 22; Admissions of Answers, R. 39-40; *State Farm Mutual Automobile Ins. Co.* v. *Carpenter*, (Cal. App.) 87 Pac. (2d) 867; (hearing denied by Cal. Sup. Ct. on April 21, 1939); *Kreifels* v. *State Farm Mutual Automobile Ins. Co.*, 62 N. D. 667; 244 N. W. 880; Opinions of various State Ins. Depts., and Attorneys General, R. 50, 53, 72, *et seq.*)

Wisconsin thus seeks to require appellant to compute and maintain an unearned premium reserve which is neither contractually nor by legal interpretation the true measure of its unearned premium or reinsurance reserve liability. It seeks to force appellant to treat as subject to possible return to its policyholders in the thirty-six states where the membership fee plan is used, a sum which under the contracts issued there is not returnable and for which no liability, either present or potential, does or can exist. On the other hand, the parties to those insurance contracts executed in those states recognizing the membership fee as no part of the premium, acquired rights beyond the borders of Wisconsin. Those contracts are neither made nor are they to be performed in that state. The company's liability for unearned premiums or reinsurance reserve on those contracts became fixed by the laws of those states. The amount paid as a membership fee is no part of that liability and bears no relationship to it whatever under those laws. What Wisconsin seeks to do here is to impress upon those contracts a burden not contracted for, namely, the creation of a reserve for a liability that does not exist in those states and *therefore cannot exist in Wisconsin*, and that wholly without any relation to anything done or to be done within its borders, quite similar to

that which was condemned as violative of due process in *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407, which we discuss hereafter.

We have here no insolvent intruder. The solvency of appellant is well established and has been heretofore discussed. (*Ante*, pp. 8, 9, 16). Likewise, we have here no solvency statute although appellee, in his motion to dismiss or affirm, suggested that the Wisconsin Court held that the statute in question (201.18 Wis. Stats.) prescribed "a uniform minimum yardstick of over-all solvency that is used for comparative purposes in testing financial soundness and responsibility" (p. 9) and that the *Hoopeston* case, 318 U. S. 313, definitely established that "such reserve requirement is well within state power". (p. 11) Ignored is the fact that the Wisconsin Court decided the case upon no such premise. To that court "over-all solvency" was immaterial:

> "The Statute specifically designates the amount of this (unearned premium) reserve. It requires the designated amount to be maintained wholly independent of the company's solvency in the sense that its assets equal its over-all liabilities. No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it cannot have a license to do business in this state and it cannot do business in this state without a license authorizing it to do it." (R. 138)

In its opinion, this was so because "the statute is so written and it has been declared valid, and as it is written it must be executed." (R. 138) Let us remember that it took a court decision to determine that premium included membership fee. (*Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161). That court was not concerned "with the probability of the company's meeting the obligation to refund unearned premiums out of its surplus or

its contingent reserve or its other assets". It was concerned only "with the carrying out of the legislative intent evidenced by the statute." (R. 139) We might pause to inquire relative to the imminence of "the probabilitiy of the company's meeting the obligation to refund unearned premium" in the absence of an obligation created, but we are content to rely upon the indisputable fact that the section in question is not a general solvency statute, is not "a uniform minimum yardstick of over-all solvency", the Attorney General of Wisconsin to the contrary notwithstanding. It is a statute designed to secure an adequate reserve to cover the unearned premium liability of the company to its policyholders and nothing else (Crobaugh, Handbook of Insurance, 1931, p. 1143), and it necessarily presupposes the existence of a premium upon which a contingent liability can be superimposed.

In *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 407, a similar principle was involved. One Dick, a citizen of Texas, brought action in a Texas state court against a Mexican corporation to recover on a policy of fire insurance for the total loss of a tug. Jurisdiction was asserted *in rem* through garnishment against the The Home Insurance Company and the Franklin Fire Insurance Company which reinsured by contracts with the Mexican corporation, part of the risks it had assumed. The garnishees are New York corporations licensed to do business in Texas. The defendant, Mexican corporation was never admitted to do busines in Texas. Suit was not commenced until more than one year after the date of the loss. The policy limited recovery to suits in accordance with Mexican law filed within one year. A Texas statute declared invalid any contractual limitation of right to sue to a shorter period than two years. This court held the Texas statute repugnant to the due process clause of the Federal Constitution, saying in part:

"The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. *It deals with the powers and capacities of persons and corporation.* It expressly prohibits the making of certain contracts. *As construed, it also directs the disregard in Texas of contractual right and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for.*" (Emphasis supplied)

In *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, this court held invalid as violative of the due process clause, a tax laid by the state of California on the receipt by appellant, a Connecticut insurance company, of insurance premiums received for reinsuring other insurance corporations against loss on policies of life insurance effected by such corporations in California and issued to residents there. Appellant was licensed to do business in California. The reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses, if any, were payable. This court, through Mr. Chief Justice Stone, said (p. 81):

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General L. Ins. Co.* v. *Johnson, supra* (3 Cal. (2d) 87, 43 P. (2) 278); compare *Morris & Co.* v. *Skandanivia Ins. Co.*, 279 U. S. 405, 408, 73 L. Ed. 762, 765, 49 S. Ct. 360. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The per-

formance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.

"The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege does not withdraw from the protection of the due process clause the privilege which California does not grant, of doing business elsewhere."

Discussing this case in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, and pointing to its inapplicability there, Mr. Justice Frankfurter, delivering this Court's opinion, said (pp. 445, 446):

"Nor does *Connecticut General L. Ins. Co.* v. *Johnson*, *supra*, (303 U. S. 77, 82 L. ed 673, 58 S. Ct. 436) present a barrier against what Wisconsin has done. Its presuppositions recognize the scope of the state taxing power we have outlined. 303 U. S. 77, 80, 82, 83 L. ed 673, 677, 678, 58 S. Ct. 436. In the precise circumstances presented by the record it was found that the tax neither in its measure nor in its incidence was related to California transactions. . . ."

That is precisely the point here. The statute of Wisconsin, as construed and applied here, is totally unrelated to Wisconsin transactions, but to transactions occurring elsewhere,—transactions, the legal consequences of which are fixed, not by the laws of Wisconsin, but by the laws of the state of occurrence. Wisconsin seeks to project its laws beyond its boundaries as to these transactions and alchemize them.

In a similar vein, in considering a Mississippi statute which invalidated and nullified certain provisions of an insurance contract entered into in another state, this Court, in *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, said at page 149:

"The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within

its own territory (*Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; *Orient Ins. Co.* v. *Daggs*, 175 U. S. 557, 565, 566, 43 L. ed. 552, 555, 556, 19 S. Ct. 281; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 398, 399, 44 L. ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. *New York L. Ins. Co.* v. *Head*, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879; *Aetna L. Ins. Co.* v. *Dunken*, 266 U. S. 389, 399, 69 L. ed. 342, 349, 45 S. Ct. 129."

We are aware that due process does not insulate appellant against state action which "may have repercussions beyond state lines. . . ." (*Osborn* v. *Olzin*, 310 U. S. 53, 62.) We are likewise aware of the equally potent doctrine that due process shields appellant from such repercussions in the absence of "a legitimate interest of the state". (Holmes, J., in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435.) Thus the issue is one of whether the doctrine of Wisconsin so affects Wisconsin's interests as to give it "the power it claims". (*Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 316.) We have, in our argument under the Commerce Clause, discussed the absence of a legitimate Wisconsin interest (*ante*, pp. 14-29) and see no necessity for reiteration.

Tafoya, 270 U. S. 426, we submit, is decisive. There it was sought to suspend Fidelity & Deposit Company from doing business in New Mexico, requiring it to file a bill in equity to prevent such suspension, the identical remedy pursued by appellant here. Suspension was premised upon the company's violation of a New Mexico statute which prohibited payment of any fee of any nature "to any person, firm or corporation not a resident of the state of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New

Mexico". The penalty for violation was suspension for not less than one year, to be removed only upon a written pledge that the statute would be observed. In holding the statute violative of due process, Mr. Justice Holmes, delivering this court's opinion, after reviewing the authorities sustaining the company's right to invoke the due process clause, said on page 435:

> "In short, it is said the purpose was to secure responsible men to represent the company on the spot. But whether such an interpretation would save the act or not it is impossible to limit it in that way. It forbids the payment of any emolument of any nature to any person for the obtaining, placing or writing of any policy covering risks in New Mexico. *The words go beyond any legitimate interests of the state. . . .*" (Emphasis supplied).

We must remember the absence of any Wisconsin interest appearing in the opinion of its Court. Compliance with the statute was mandatory because it "is so written and it has been declared valid, and as it is written it must be executed." (R. 138) It was constitutional because of its like operation upon all. This doctrine, not having saved Mr. Tafoya, should not save Mr. Duel. With all deference, it is apparent that Wisconsin begged the question here. Notwithstanding relevant authorities of this Court cited in our briefs, Wisconsin's Court did not factually investigate or consider whether the statute as construed went "beyond any legitimate interest of the state" or whether it affected Wisconsin's interests as to give Wisconsin "the power it claims."

Nothing in *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 or *Osborn* v. *Ozlin*, 310 U. S. 53, militates against appellant. In each of those cases a legitimate state interest was present: solvency and convenience in the former (318 U. S. 313, 318); service and lessening of "risks of casualty and loss" in the latter (310 U. S. 53, 64). In the lat-

ter, this Court, through Mr. Justice Frankfurter, was careful to point out that what Virginia had done was "very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state powers matters unrelated to any local interests." (p. 65) *That is the very point here.*

At the risk of repetition, we ask, what conceivable legitimate local interest does Wisconsin have in requiring appellant to set aside a reserve on business transacted outside its borders to secure a contingent liability non-existent there? With much greater force does the claimed right demand denial when no question is raised as to appellant's solvency and it complies with all of Wisconsin's solvency statutes! If Wisconsin has no "legitimate interest," if its interests are not so affected as to give it "the power it claims," and we submit it has none, then we have a clear effort by Wisconsin to regulate insurance contracts entered into beyond its borders by giving extraterritorial effect to its statute, an unconstitutional assumption of power, proscribed by due process.

III.

Section 201.18, Wisconsin Statutes, as construed and applied by its highest Court violates the full Faith and Credit Clause, Article IV, Section 1 of the Constitution of the United States.

Legislative recognition of the importance of insurance companies occurred early in the history of our country. First this recognition was in the form of charters for individual companies. These early charters contained provisions for the protection of the insuring public. With the growth of the country and the expansion of the means of transportation, the insurance business grew and the problems of supervision became more complex. As stated

by the Honorable George W. Miller, Superintendent of Insurance of the State of New York, on February 3, 1871:

> "The past and prospective increase in the number of state departments, each established under different laws and adopting different forms, rules, and regulations, has naturally tended rapidly to increase the labors and consequent expense of insurance companies, and, of course, to absorb by so much the security or funds of the insured. . . . The most feasible and practicable mode of securing that simplification and unification both of form and of law, which public interests seem to demand, will be found in concertive action on the part of those several state officers charged by their respective states with the supervision of insurance." (Huebner Foundation Lectures, University of Pennsylvania Press, 1943, pp. 12, 13)

Out of the conventions described in the foregoing lectures have come many cooperative practices, including uniform forms and procedures for the examination of insurance companies, as well as convention examinations, wherein a committee of several states, through representation, make examinations of companies and the results of these examinations are given full faith and credit in all other states in which the company is licensed or is making application for license.

Each step toward cooperation was taken with full recognition of the sovereignty of each particular state but understanding full well that the importance of the business required a degree of uniformity in regulation and supervision not inherent in the independent action of each state or without faith and credit in the acts of the several respective states as they took care of this growing public business within their own respective borders. "This business is not separated into 48 distinct territorial compartments which function in isolation from each other." (Per Black, J., in S.E.U.A., 322 U.S. 533, 541)

Into that extensive field of individual state regulation came appellant in 1922. In 1939 it was licensed to transact business in 38 states. Legal recognition thus accorded appellant's method of doing business finds buttressing support in six cooperative state examinations (R. 56). In 1942 came Wisconsin and for the first time announced a new concept of premium wholly inconsistent with that of all the other states and at direct variance with its position at the time it licensed appellant in 1939,—a position which requires appellant to set aside a large sum of money as a reserve for a liability in 36 states, non-existent there.

The statutory acts for the regulation of the insurance business in several states are "Public Acts" and therefore are entitled to full faith and credit in the constitutional sense (*John Hancock Mut. Life Ins. Co.* v. *Yates*, 299 U.S. 178, 183). Likewise, liabilities created by statute or court decision, particularly those created by the chartering state, are entitled to full faith and credit (*Royal Arcanum* v. *Green*, 237 U.S. 531, 542-543; *Modern Woodmen* v. *Mixer*, 267 U.S. 544, 551). The granting of a license to transact an insurance business in a state is a certification of compliance by the licensee with all provisions of the licensing state concerning the conduct of that business (*State of Ohio ex rel. Richard* v. *Ackerman*, 51 Ohio 163, 37 N.E. 828, 24 L.R.A. 298, 309).

State Farm Mutual Automobile Ins. Co. v. *Carpenter* (Calif. App.) 87 Pac. (2d) 967, hearing denied by Supreme Court of Cal. (R. 79), *Kreifels* v. *State Farm Mutual Automobile Ins. Co.*, 62 N. D. 667, 244 N. W. 880 (R. 62) and *State Farm Mutual Automobile Ins. Co.* v. *Earle, as Insurance Commissioner of the State of Oregon*, a decision of the Circuit Court in said State (R. 68), hold that the membership fee charged by appellant is not a part of the premium relative to business transacted in those jurisdictions. Such also are the uniform rulings and inter-

pretations placed upon the statutes of all other states in which appellant conducts its business by the proper state officials, save only Wisconsin, and this record contains abundant evidence thereof (R. 51, 57, 72-89). Appellant is an Illinois corporation and the record shows that the Director of Insurance of that State, under oath, states that the law of Illinois declares that membership fees collected in Illinois "are not a part of the premium" (R. 52). Appellant's position finds concurrence in the periodical examinations made jointly by and under the direction of the National Convention of Insurance Commissioners of two or more of the insurance departments of states in which it is licensed to do business (R. 16, 17, 51). Adamant, Wisconsin stands alone.

"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other state." Simple and commanding language, integrally a part of the great plan "to weld a loose confederacy into a single, indivisible Nation" wherein, for the common good of all, deference and regard for the judgments and policies of one state must be observed in others. In its most recent pronouncement, this Court said (Stone, C. J., in *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 439):

> "The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application."

This doctrine becomes an illusory one if Wisconsin need not accord any faith or credit to the judicial determinations of California, North Dakota and Oregon, not to mention the interpretations and rulings of the other states as

to the meaning of their statutes? Wisconsin accords no faith and credit to anyone. Only esoteric Wisconsin knows what premium means, and, knowing its meaning, her egocentricity demands that everyone everywhere accord to it the same meaning, thereby enabling her to superimpose her reserve for unearned premium statute on business transacted in every city and hamlet in the Nation. We see little faith and credit here.

But what are Wisocnsin rights under the Federal system? It may "establish laws, through both its judicial and its legislative arms, which are controlling upon *its inhabitants and domestic affairs.*" (Emphasis supplied) (*Pink* v. *A.A.A. Highway Express, Inc.*, 314 U. S. 201, 209.) But when such laws clash with the rights of the inhabitants of other states, under the laws peculiar to those states, "This court must determine for itself the extent to which the statutes of one state may qualify or deny rights asserted under the statutes of another." (*Alaska Packers Assn.* v. *Ind. Acc. Comm.*, 294 U. S. 532, 547.) The examination under this function requires "appraisal (ing) of the governmental interests of each jurisdiction and turning the scale of decision according to their weight." (*Alaska Packers Assn.* v. *Ind. Acc. Comm.*, 294 U. S. 532, 547.) That philosophy proceeds from the fundamental ground that "The Constitution and principles of legal thinking allow the law of the place where the contract is made to determine the validity and consequences of the act." (*Mutual Life Insurance Co.* v. *Liebing*, 259 U. S. 209, 214 (1922).) The full faith and credit clause does not permit "one state to legislate for the other or to project its laws across state lines * * *." (*Pacific Employers Ins. Co.* v. *Ind. Acc. Comm.*, 306 U. S. 493, 504.) Neither does it "enable one state to override the laws and policy of another." (*Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 438.)

Wisconsin seeks to do just that! Attempting by virtue of full faith and credit to preclude California from enforcing its own law as to events occurring within its borders is vastly different than insisting that Wisconsin accord the same full faith and credit to transactions without as are accorded in states of occurrence. And when consideration is focused upon the absence of any Wisconsin interest, as compared to the impelling interests of the great number of states arrayed against it, if that Clause has become "a national unifying force," if it made each State "an integral part of a single Nation, in which rights judicially established in any part are given nation-wide application," then the necessity for its application in the case at bar becomes imperative.

CONCLUSION.

It is respectfully submitted that, for the reasons urged herein, the judgment of the Supreme Court of Wisconsin should be reversed, or, should this Court be of opinion that the issue of interstate commerce should not be passed upon by it at this time and the issues of due process and full faith and credit are not determinative, that the judgment be vacated and the cause remanded for further proceedings to enable the Supreme Court of Wisconsin to pass upon the commerce issue. (*Wallina* v. *Reuter Co.*, 321 U.S. 671, 676 and cases cited.)

Respectfully submitted,

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Chicago, Illinois, December 16, 1944.

APPENDIX IA.

STATUS AS TO STATE RETALIATORY LAWS.

Summary of Situation in Various States as Compiled by C. C. Fraizer, Director of Insurance of Nebraska as Chairman of the Laws and Legislation Committee of National Association of Insurance Commissioners.

In his capacity as chairman of the laws and legislation committee of the National Association of Insurance Commissioners, C. C. Fraizer, Director of Insurance of Nebraska, sent a questionnaire to the Insurance Department of each state on the existing situation as to retaliatory laws in that state. A summary of the information obtained is given by Ernest D. Gerye, assistant to the director, in a report to Director Fraizer in which he says:

"Briefly summarizing the information hereinabove contained, it appears that none of the states have experienced serious difficulty applying the Retaliatory provisions of the laws of the several states with reference to taxes, fees and licenses. There is this difference, however, some states have concluded that the purpose of retaliation in respect to licenses, fees and taxes is not necessarily retaliation, but rather a leveling process so that there will be no discrimination as between states. Such states figure licenses, fees and taxes on an aggregate basis and if the total fees, taxes and licenses required by one state are greater in amount than the licenses, taxes and fees required of foreign companies by the retaliating state, then such state will require the company of that state to pay the larger amount. In Nebraska, and in some of the other states, our Retaliatory Laws have been construed on a fee for fee basis rather than on an aggregate basis.

"It is respectfully suggested that uniformity in the application of the Retaliatory Laws as respects taxes, fees and licenses would be highly desirable and will tend to lessen friction and make for better cooperation.

"The real difficulties, however, are to be found in those Retaliatory provisions with reference to 'penalties, obligations and prohibitions,' as hereinabove suggested. It would seem that the industry and regulations would be in a better position to serve the public if the Retaliatory Laws could be made permissible rather than mandatory. That is to say, if the several departments were given discretion in such matters."

The situation as to the Retaliatory Laws in the several states is given briefly in the following:

Alabama.

Alabama reports that the Attorney General of that state has ruled that the Retaliatory Laws of Alabama are unconstitutional and void. The ruling appears to be based upon a decision of the Supreme Court of Tennessee construing a former retaliatory law. The Attorney General concludes that the present law contains the same faults which were found in the former law.

Arkansas.

Arkansas has no general retaliatory law. There is a provision requiring retaliation in respect to non-resident brokers licenses. The law also requires life, health and accident companies domiciled in foreign states to make certain deposits when the laws of such foreign states require such deposits to be made by Arkansas companies.

California.

California does not retaliate except when a foreign state discriminates as between California companies and the

domestic companies of such states. By decision of the Supreme Court of California in the case of Bankers Life Company versus Richardson, 218 Pac. 586, the Retaliatory Laws are to be strictly construed and executed with care.

Connecticut.

In the past few years Connecticut has retaliated only with respect to taxes, fees and licenses. The state also requires deposits for certain lines of insurance when foreign states make the same requirements of Connecticut companies.

District of Columbia.

The District of Columbia has no retaliatory law.

Florida.

The state of Florida reports that it has experienced no difficulty with other states. In 1943 a Retaliation Law affecting non-recident agents and brokers was passed. The Commissioner reserves comment on the 1943 non-resident law.

Georgia.

Prior to the year 1944, the state of Georgia has not endeavored to retaliate against other states. The state is now attempting to require companies to pay the same taxes, fees and other charges which the foreign state of the company's domicile requires of Georgia companies. The companies have been paying the taxes required under protest. There have been no legal actions commenced so far. The Commissioner states that the tax laws of Georgia are antiquated and unlike those of other states.

Idaho.

Idaho has no Retaliation Laws.

Illinois.

The Illinois Department states that the Federal Life Insurance Company, an Illinois insurance company, has been unable to get into the state of Wisconsin. The same comment is made with reference to the Mid States Insurance Company. The Commissioner further states that the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, has been doing business in the state of Wisconsin; that legal proceedings are now pending in the courts with reference to tax matters, and that the state of Wisconsin has refused to renew the company's licenses. Illinois also complains that the All States Insurance Company and the All States Fire Insurance Company have had applications pending for admission to the state of Massachusetts for some three years; that the license has not been denied, however, they have not been issued.

Indiana.

Indiana states that the Emmco Insurance Company of South Bend, Indiana, which writes fire coverages, has been unable to get into the State of Massachusetts.

Kansas.

The state of Kansas reports that the Department retaliates only with reference to taxes, fees and deposits. The state has not experienced any difficulty with reference to the Retaliatory Laws.

Louisiana.

The Secretary of State, of Louisiana, reports that he is now on the job and will make a report at a later time.

Maine.

The state of Maine reports no difficulty in the enforcement of its Retaliatory Laws.

Maryland.

The state of Maryland reports no difficulty with other states with reference to the enforcement of Retaliatory Laws. The law is being applied with reference to aggregate charges. The Commissioner suggests that retaliation should be made permissible rather than mandatory.

Michigan.

The state of Michigan reports that it has experienced no difficulty in the application of the Retaliatory Statutes.

Mississippi.

The Retaliatory Statute of Mississippi was enacted in 1942 and the Insurance Department reports that same has been applied only with reference to non-resident brokers.

Nebraska.

The state of Nebraska has experienced no difficulty in the application of its Retaliatory Laws. The laws are applied chiefly as respects licenses, taxes and fees.

Nevada.

The Retaliatory Law that formerly obtained in the state of Nevada was repealed in 1941. The state now has no Retaliatory Laws.

New Hampshire.

New Hampshire applies the retaliatory provisions with respect to deposits and bonds; and also with respect to taxes and fees. The state has experienced no difficulty in this connection.

New Jersey.

The state of New Jersey recently amended the Retaliatory Laws so that the law does not now apply to restrictions on the kinds of business that may be done in the state.

North Carolina.

The Retaliatory Laws of North Carolina have been applied to licenses, fees, and taxes and to non-resident brokers. There has been little or no difficulty in the application.

North Dakota.

North Dakota has applied retaliation as to non-resident agents and brokers licenses.

Ohio.

Ohio reports that the only difficulty encountered with reference to the application of Retaliatory Laws is with reference to "penalties, obligations and prohibitions." The Commissioner referred to the Workmen's Compensation Laws of Ohio which prohibit all companies, foreign and domestic, from writing Workmen's Compensation coverage in the state of Ohio. The Commissioner also referred to the proposition that New Jersey did not permit the writing of personal floater policies.

Oregon.

The Retaliatory Laws of Oregon are mandatory only as effects "other obligations and prohibitions". Otherwise, the laws are permissive.

Pennsylvania.

Pennsylvania has retaliated as against Ohio companies writing Workmen's Compensation in Pennsylvania. Under Ohio law, no insurance company is permitted to write Workmen's Compensation. There is a state fund for that purpose. Ohio does authorize its domestic companies to write Workmen's Compensation outside of Ohio, but does not permit such companies to write such coverage within the state. As a result of this situation, Ohio has experienced difficulty with several states including Vermont and New Jersey. However, since the amendment of the New Jersey law noted above, New Jersey now permits Ohio to write Workmen's Compensation in that state.

Rhode Island.

Rhode Island reports that other states have cooperated freely and that it has experienced no difficulty in the application of the Retaliatory Laws.

Tennessee.

Tennessee reports difficulties with Kentucky with reference to non-resident agents and brokers.

Texas.

The state of Texas retaliates concerning taxes and fees on an aggregate basis in all states except South Dakota,

Utah, Indiana, Iowa, Missouri, Minnesota, Nebraska, North Dakota, Oklahoma, Rhode Island, South Carolina and Wisconsin. The Texas Department says that in the states last named, retaliations is on a fee by fee basis. The state also requires certain deposits to be made by California and Delaware companies.

Vermont.

Vermont reports difficulty with Ohio with reference to Workmen's Compensation Underwriters. Reference is made to the comment under "Pennsylvania."

Virginia.

The state of Virginia also reports difficulty with reference to Ohio companies writing Workmen's Compensation. It has been decided, however, that Virginia laws do not require retaliation as against Ohio companies writing such coverage.

Washington.

Washington reports no difficulty in the application of the Retaliatory Laws.

West Virginia.

Section 3278 of the insurance laws of the state of West Virginia vests discretion in the Insurance Department, or Commissioner, with reference to the application of retaliatory provisions.

Wisconsin.

The state of Wisconsin has applied the Retaliatory law with respect to taxes, licenses and fees, and reports that no problems have been encountered.

(The Eastern Underwriter, December 8, 1944, pp. 47, 112)

APPENDIX IB.

CITATIONS TO VARIOUS RETALIATORY PROVISIONS OF THE SEVERAL STATES.

Ala.	Code (1928) sec. 8363.
Ariz.	Rev. Code (1928) sec. 1807.
Ark.	Pope's Dig. Stat. (1937) secs. 7780, 7833.
Cal.	Deering's Ins. Code (1937) sec. 1560.
Colo.	Stat. Ann. (1935) chap. 87, sec. 94.
Conn.	Gen. Stat. (1930) sec. 1281.
Del.	Rev. Code (1935) sec. 9[illegible].
Ga.	Code Ann. (1935) sec. 56-315.
Ill.	State Bar Stat. (1935) chap. 73, par. 80.
Ind.	Burns' Stat. (1928 Supp.) sec. 39-5012.
Iowa.	Code (1935) secs. 8612-cl, 8707, 8720.
Kan.	Gen. Stat. (1935) sec. 40-253.
Ky.	Carroll's Stat. Ann. (1936) sec. 637.
La.	Dart's Gen. Stat. (1932) sec. 4034.
Me.	Rev. Stat. (1930) chap. 12, sec. 57.
Md.	Bagby's Ann. Code (1924) art. 48A, sec. 41.
Mass.	Ann. Laws (1932) chap. 175, sec. 159.
Mich.	Stat. Ann. (1935) sec. 24.18.
Minn.	Mason's Stat. (1927) sec. 3721.
Mo.	Rev. Stat. (1929) sec. 5935.
Mont.	Rev. Code (1935) sec. 6155.
Neb.	Comp. Stat. (1929) sec. 44-1121.
Nev.	Comp. Laws (1938 Supp.) sec. 3649.
N. H.	Pub. Laws (1926) chap. 275, secs. 47 to 54.
N. J.	Rev. Stat. (1937) sec. 17:32-12.
N. M.	Stat. Ann. (1929) sec. 71-129.
N. Y.	Cahill's Cons. Laws (1930) chap. 30, sec. 33.

CITATIONS TO VARIOUS RETALIATORY PROVISIONS OF THE SEVERAL STATES (Contd.).

N. C.	Code (1931) sec. 6413.
N. D.	Comp. Laws (1913) sec. 4979.
Ohio	Throckmorton's Rev. Code (1936) secs. 658, 5436.
Okla.	Stat. Ann. (1936) title 36, sec. 666; Stat. Ann. (1937 Supp.) title 36, sec. 196.
Ore.	Code (1930) sec. 46-110.
Pa.	Purdon's Stat. (1936) title, sec. 50.
R. I.	Gen. Laws (1923) sec. 3758.
S. C.	Laws of 1934, act 793.
S. D.	Comp. Laws (1929) sec. 9170.
Tenn.	Williams' Code Ann. (1934) sec. 6124.
Tex.	Vernon's Stat. (1936) art. 4758.
Utah	Rev. Stat. (1933) sec. 43-3-8.
Vt.	Pub. Laws (1933) secs. 7016, 7071.
Va.	Code (1938 Supp.) sec. 4233.
Wash.	Rem. Rev. Stat. (1931) sec. 7092.
Wis.	Stat. (1937) secs. 76.35, 76.36.
Wyo.	Rev. Stat. (1931) sec. 57-435.

TWO OF THE TYPICAL RETALIATORY LAWS ARE QUOTED BELOW:

Illinois Revised Statutes, 1943—Insurance—Chap. 73, ¶1056

Retaliation.) Whenever the existing or future laws of any other state or country shall require of companies incorporated or organized under the laws of this State as a condition precedent to their doing business in such other state or country, compliance with laws, rules, regulations

and prohibitions more onerous or burdensome than the rules and regulations imposed by this State on foreign or alien companies, or shall require any deposit of securities or other obligations in such state or country, for the protection of policyholders or otherwise or require of such companies or agents thereof or brokers the payment of penalties, fees, charges or taxes greater than the penalties, fees, charges or taxes required in the aggregate for like purposes by this Code or any other law of this State, of foreign or alien companies, agents thereof or brokers, then such laws, rules, regulations and prohibitions of said other state or country shall apply to companies incorporated or organized under the laws of such state or country doing business in this State, and all such companies, agents thereof, or brokers doing business in this State, shall be required to make deposits, pay penalties, fees, charges and taxes, in amounts equal to those required in the aggregate for like purposes of Illinois companies doing business in such state or country, agents thereof or brokers. Whenever any other state or country shall refuse to permit any insurance company incorporated or organized under the laws of this State to transact business according to its usual plan in such other state or country, the director may, if satisfied that such company of this State is solvent, properly managed, and can operate legally under the laws of such other state or country, forthwith suspend or cancel the license of every insurance company doing business in this State which is incorporated or organized under the laws of such other state or country to the extent that it insures in this State against any of the risks or hazards which are sought to be insured against by the company of this State in such other state or country. As amended by act approved July 21, 1941. L. 1941, vol. 1, p. 837. S. H. A. 83—1056; J. A. 66.1119.

 76.35 Increase of fee of foreign company.

Whenever the laws of any other state of the United States or of any foreign country, or the rules, regulations, requirements or impositions thereof, or of any department or officer thereof shall require of insurance companies or fraternal benefit societies organized under the laws of this state and doing business in such state or foreign country or of their agents, any deposit of securities for the protection of their policyholders or otherwise, or any payment of taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required by the laws of this state for the same purposes from similar companies or fraternal societies organized under the laws of such other state or foreign country and doing business in this state, or shall impose other obligations, prohibitions or restrictions additional to or in excess of those imposed by the laws of this state upon insurance companies or fraternal benefit societies of such other state or foreign country or their agents, then all such companies or fraternal benefit societies of such other states or foreign country doing business within this state shall make the same deposit with the state treasurer and shall pay him the same sum for taxes, fines, penalties, certificates of authority, license fees or otherwise, and the same obligations, prohibitions or restrictions of whatever kind shall be imposed upon them and their agents as a condition to the issuance of a license to them, as is required to be made or paid or is imposed upon companies or societies of this state or their agents by the laws of such other state or foreign country, or the rules, regulations, requirements or impositions thereof, or of any department or officer thereof.

76.36 Foreign Insurance Companies; Reciprocal Taxation. When any insurance corporation or other insurer of this state shall be licensed to transact insurance in any

other state, territory, or district of the United States, like insurance corporations or insurers from such other state, territory or district shall pay no other or greater taxes, fees, or licenses than are or would lawfully be imposed upon and collected from like insurance corporations or insurers of this state by such other state, territory or district; but the amount of such taxes or fees paid by insurance corporations or insurers subject to sections 76.34, 200.13 and 201.59 shall not be less than the amount required and applied as provided in said sections, and the amount of such taxes paid by insurance corporations or insurers under the provisions of subsection (1) of section 76.30 shall not be less than three-eighths of one per centum on the amount of the gross premiums received for direct insurance, less the deductions provided in section 76.31, by such corporations or insurers during the preceding year in this state. This section shall not apply to insurance corporations or other insurers of any foreign country.

APPENDIX II.

Section 201.03, Wis. Stats. Incorporation of Mutual Companies.

"• • •

"(9) Any mutual insurance company after January 1, 1943 transacting automobile insurance authorized by subsection (15) of section 201.04 shall maintain a minimum surplus of $50,000 and when such surplus falls below $50,000, the commissioner shall order the surplus replaced and if not so replaced in 15 days, the commissioner may proceed against such company under section 200.08."

Section 201.32, Wis. Stats. Foreign Companies; admission.

"• • •

"(3) A mutual company shall satisfy the requirements as to solvency and the limitations as to expenses exacted of like domestic companies."

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Reply Brief for Appellant.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Reply Brief for Appellant.

MAY IT PLEASE THE COURT:

I.

THE STATUTE AS CONSTRUED AND APPLIED IS INVALID UNDER THE COMMERCE CLAUSE.

(a) Appellant Places an Interpretation Upon the Statute not Placed Upon it by the Wisconsin Court.

In this reply we assume, as we assumed in our original brief, that this Court and the parties hereto, in determin-

ing the constitutionality of the Statute in question (Wis. Stats. 201.[illegible]. Or. Br. 11), are bound, as to its meaning and purpose, by the construction placed upon it by the State Court (*Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, 223; *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 330). When this elemental rule is placed alongside appellee's brief, it becomes apparent that "the fugitive exigencies of the hour" required that this rule be ignored. The question at bar, therefore, is not how Messrs. Riegel and Loman in their book, Insurance Principles and Practices, (Opp. Br. 15, 16) or Professor Huebner in his book, Property Insurance, (Opp. Br. 23), and this with all deference, define generally an unearned premium reserve, but rather how the Supreme Court of Wisconsin defined the meaning and purpose of its unearned premium reserve statute. (*Duel* v. *State Farm Mutual Automobile Insurance Co.*, 240 Wis. 161, 178.)

Particularly is this true in a case where other Wisconsin Statutes provide for reserves for all losses (Wis. Stats. 204.27 and 204.28, App. I, This Reply) and other Wisconsin Statutes (201.03 and 201.32, App. II, Orig. Br. 58) set forth the minimum standard of solvency and Wisconsin Statute 201.50 (Opp. Br. 55) provides a comprehensive sworn annual statement "suitable for eliciting a true and complete exhibit of the financial condition . . . of each company." Under these other statutes, Wisconsin has ample authority to make appellant set up adequate reserves to secure all liabilities, and possess in addition thereto, a minimum surplus of $50,000.00. And particularly is this true in a case where no one claims that appellant does not comply with these other statutes, where the solvency of the Company is well established (Orig. Br. 16, R. 102), where it already carries a surplus of $8,944,982.39 in excess of the minimum requirement of $50,000.00 surplus set forth in the Wisconsin Statutes

(App. II, Orig. Br. 58), and, in addition thereto, a voluntary and unassigned contingent reserve of $4,000,000.00 (Orig. Br. 16, R. 102). Particularly is this true in a case where the maximum additional reserve requirement under Wisconsin doctrine could not exceed $815,103.20 for 1942 (Orig. Br. 15), or approximately 6% of the amount the Company carries voluntarily as surplus and contingent reserve over and above the statutory requirements of Wisconsin. This case, obviously, must be decided in the light of these undisputed facts, as we assume the Supreme Court of Wisconsin decided it, and in the light of which we submit that its opinion should be read.

Much has been said in appellee's brief of the purpose of the statute being to determine the Company's "financial condition and stability" (Opp. Br. 14), that it "is grounded upon protecting the citizens and residents" of its State (Opp. Br. 27), etc. Examination of the Wisconsin opinion discloses no such concurrence. Are we, therefore, to assume that its highest Court was unmindful of these claimed purposes? Certainly not! They were argued there just as they are argued here, and they were rejected as extraneous there as they should be so rejected here. This statute, said the Wisconsin Court, required the designated reserve "to be maintained wholly independent of the company's solvency in the sense that its assets equal its overall liabilities" (R. 138). And why? Because "the statute is so written * * * and as written it must be executed" (R. 138). That Court was "not concerned with the wisdom of the statute, nor with the probability of the company's meeting *the obligations to refund unearned premiums* (emphasis supplied) out of its surplus or its contingent reserve or its other assets." It was concerned only "with carrying out the legislative intent evidenced by it" (R. 139).

What was this legislative intent? It was, as it said in its former opinion construing the purpose and meaning of the Statute "impossible to repel the implication from all this that the amount exacted to cover the cost of insurance shall buy insurance protection which may be so measured *that the unearned portion of the premium deposit may be ascertained and returned*" (240 Wis. 161, 178; emphasis supplied). The legislative intent was, therefore, that the Statute was designed, as we have argued, "to maintain in trust for the exclusive right of the policyholders, a sum equal to the unearned part of the premiums already collected" (Crobaugh, Handbook of Insurance, p. 1131; Orig. Br. 23).

Now, as we said in our original brief (p. 14), the key to the problem lies in the definition of premium. Why? Because a premium must be collected before the Statute can apply by its terms. The reserve is computed "by the commissioner setting up fifty per cent of the *premiums received* on all risks" (Wis. Stats. 201.18; Orig. Br. 11). Does that mean according to Wisconsin its definition of premium as to business transacted there (as the Company concedes), and, to the other states as to business done there, the definition there recognized? It does not, says Wisconsin. It means impressing on business transacted everywhere Wisconsin's definition of premium so that its reserve for unearned premium statute can be superimposed on such business conducted elsewhere to assure "the Company's meeting the obligation to refund unearned premiums" as to business done in other states where both the obligation to return and the presence of premium, according to the laws of those states, is nonexistent!

The statute, as thus construed and applied was held constitutional not because its purpose was to secure "financial condition and stability in the future as well

as the present" (Opp. Br. 14), not for "purposes of determining the company's financial condition and stability" (Opp. Br. 16), not "for the purpose of computing reserves in testing financial soundness and stability" (Opp. Br. 24-25), not for the purpose of "assuring that citizens and residents of Wisconsin who have damage claims against policyholders will be protected by the company having adequate assets to pay the same" (Orig. Br. 26), nor for any Wisconsin purpose or interest stated, legitimate or otherwise. We take the word of the Wisconsin Court that it held the statute constitutional because of its equal operation upon all, because "the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do" (R. 139).

Now, then, if we are correct in these assertions and we submit that we are, it must become immediately apparent that all of appellee's argument must fail as being based upon premises non-existent—premises equally as illusory, if the Court please, as the concept of membership fee being a part of premium in states other than Wisconsin and the existence of a liability there to return a part of such membership fee under any circumstances (Opp. Br. 14, 15, 31).

But we haven't mentioned that the Statute also refers not only to an "unearned premium" but a "reinsurance reserve" (Orig. Br. 11). Neither did the Supreme Court of Wisconsin for the obvious reason that it is but one reserve, the terms being used interchangeably (Crobaugh, Orig. Br. 23) and for the further reason, as anyone familiar with the insurance business well knows, that the alternative purpose of this reserve "the amount necessary for reinsuring the risks" (Crobaugh, Handbook of Insurance, p. 1143, Orig. Br. 23), presents no solvency problem as the

reinsuring company acquires the business without acquisition expense, such as agency commissions, etc., and reinsures only for the remainder of the term and acquires the reserve set up. Especially is this true where the company selling the business has a substantial surplus as at bar. Surplus comes from earnings and, to acquire a surplus, a company must have an adequate rate structure and a profitable underwriting experience. Appellant's surplus, acquired by virtue of its operations since 1922, the date of its inception, conclusively demonstrates the adequacy of its rate structure. Faced with these facts, the Supreme Court of Wisconsin necessarily held that the purpose of its unearned premium reserve statute was to maintain a sum sufficient to discharge the Company's "obligation to refund unearned premiums" (R. 139). Therefore, as we have indicated, the constitutionality of this Statute must be viewed in the light of this construction and none other, namely, a statute designed to secure discharge of the Company's "obligations to refund unearned *premiums*." Appellee virtually concedes that the statute, as thus construed, is "unreasonable and inoperative" (Opp. Br. 13, 14).

(b) Appellee places an incorrect interpretation upon the statute as construed and applied (1) in failing to recognize that it is not an over-all solvency reserve statute but a special reserve statute, limited in purpose and effect, namely, to secure the discharge of a liability to return unearned premiums; and (2) in failing to recognize its extra-territorial application and construction. Thereby he seeks to destroy the life membership fee plan everywhere.

Appellee misconceives both the purpose and application of the statute as construed and applied. This statute is not an over-all solvency reserve statute, but a limited one to

serve the special purpose indicated. It is not meant to perform the function of Wisconsin's capital and surplus statute in determining solvency (Wis. Stat. 201.03 and 201.32, Appendix II, Orig. Brief 58), nor the function of its loss reserve statutes, (Wis. Stat. 204.27 and 204.28, Appendix I This Reply p. 23) to guarantee the payment of losses. It is a statute designed solely to secure the discharge of the company's "obligation to refund unearned premiums" as the Court advised us on two occasions (240 Wis. 161, 178, R. 139).

To argue that "no surplus exists until this reserve has been calculated and given effect as a liability" and when this is done "it may be that it would completely wipe out the asserted surplus and the contingent reserve", and that "this is the very reason the statute requires such reserve to be calculated and shown as a liability", and to conclude that "with this in mind the ridiculousness of saying that this reserve has no pertinency to over-all solvency is obvious" (App. Brief 19) is only to accentuate the misconception. It must be perfectly obvious that there is no purpose in creating a reserve to secure a contingent liability in the absence of a contingent liability. If the company has no "obligations to refund unearned premiums", as to the business upon which this reserve is sought to be based, and it has none, then the absurdity of the argument becomes apparent.

Then to assert that an unearned premium reserve must necessarily "be determined upon a unitary basis" (Opp. Br. 16) nationally is simply to argue that the total is not equal to the sum of its parts and to ignore elemental and universal insurance practice and state requirements. Every insurance company must keep records by states, not only because of state requirement, but also for the obvious reason that it must know whether the business is profitable or unprofitable in each territory. Every company must

and does constantly compare the premiums earned in a given state with the losses incurred in such state. If this were not true, no company would be able to make rates by states. Each financial statement filed by this Company in Wisconsin must show the premium income from each state and the membership fee income from each state and must show the total of these items. Liabilities for unearned premiums are obviously determined by the law of each state. The unearned premium reserve, being designed to secure the liability of the company to return unearned premium, necessarily is based upon the definition of premium in each of the states. Thus, from the financial statement, Wisconsin is able to determine state by state, the unearned premium liability of this or any other company. Texas, Arizona and Louisiana, which do not permit the use of the membership fee plan, have no difficulty in this regard, permitting the Company to operate there unhampered as this record admits. The annual reports on file with the Wisconsin Insurance Commissioner are public records and the subject of judicial notice. For convenience, therefore, we have reproduced pages 9 and 33 of the annual report of this Company on file with appellee for the year 1942 (Appendix II, This Reply 29) to illustrate application of the foregoing.

To buttress his argument that no attempt is made to give the statute extraterritorial effect, appellee says that "this Statute does not say that life membership fees are premiums in other states" (Opp. Br. 38). This is only literally correct inasmuch as the Statute does not mention life membership fees. As construed and applied, however, it does say that premium includes membership fee wherever collected, effectually destroying the concept of membership fee (Orig. Br. 14) and torpedoing the membership fee plan. It is exactly like saying, as New York said in *Baldwin* v. *Seelig*, 294 U. S. 511 (Orig. Br. 20, 21) that it was not interfering with the price of milk in Vermont nor the

importation of such milk into New York. The importer could buy it and drink it, couldn't he? Likewise, Wisconsin is not interfering with our membership fee in Illinois. We can still call it a membership fee in Illinois, can't we? We do not have to sell our insurance in Wisconsin, do we? But if we do wish to sell our insurance in Wisconsin, we can still call our membership fee plan a membership fee plan in Illinois and elsewhere if we insist upon nomenclature, but to Wisconsin, what we collect is a premium upon which its statute operates and imposes its full burden. To assert that this is not giving extraterritorial effect to its statute is to becloud the substance of the transaction with verbiage.

Screening his real purpose, he argues that we stand the same as the employer in *Walling* v. *Helmerich & Payne*, ... U. S. ....., 89 L. Ed. 1, suggesting that our life membership fee plan is "an ingenious method to circumvent . . . the reserve requirements of the Wisconsin statute and negative the very purpose thereof" (Opp. Br. 27). He points to language in the Wisconsin Court's first opinion to the effect that to permit the plan is to put it "within the power of insurers to set their own reserve requirements by redefining 'premium' " (Opp. Br. 27). Plausible though it may seem, it is obviously untenable. In the first place, we do not define premium or fix the reserve requirements in any state. The laws of the state where the insurance is written does that and we are bound to conformance therewith as to business transacted there. Wisconsin's first opinion clearly proves this. When one considers the object and purpose of the Wisconsin statute, as defined by its Court, namely to secure appellant's "obligation to refund unearned premiums" (R. 139; 240 Wis. 161, 178) with the non-existence of obligation to refund membership fees in other states, not being there considered premiums, it is obvious that Wisconsin's statute is not and cannot be circumvented. At all times appellant must have and has a

sufficient reserve to discharge its "obligation to refund unearned premiums" wherever collected and however defined.

Let us make no mistake about his real purpose. It is to torpedo the membership fee plan everywhere, the plan which, for as much as any other reason, is responsible for appellant's successful growth and sound financial condition. This membership fee is in large part disbursed to agents as their initial commission for writing the business. Thereafter their renewal commissions are reduced in ratio similar to the practice in life insurance. In reality, we are writing automobile insurance on the life insurance plan instead of paying the same large commission yearly to agents for the mere renewal of the policy, the practice generally in automobile insurance. Under our plan, agents are paid in proportion to the work and service performed. Wisconsin seeks to wreck this plan, successfully conducted since 1922, by requiring a reserve to be set up on membership fees which have already been disbursed to agents as compensation. Under Wisconsin doctrine either the agent must work for less or appellant must supply the difference from its surplus,—must set this up as a trust fund, maintain it indefinitely, to secure a non-existent liability, thereby withdrawing it from commerce, all to the obvious burden and detriment of its policyholders. As recognized in all states, save Wisconsin, the membership fee bears no resemblance to a premium. It insures no risk. It is not returnable. Its benefits do not expire with the current term of insurance. It gives a life option to purchase insurance but it purchases none. The rights given by it are in existence even though the insurance is not in force. It occurs to us that we should think "things, not words", as Justice Holmes admonished us years ago.

(c) Appellee disregards the substance of the requirement imposed by the statute, as construed and applied, by denominating it a bookkeeping transaction.

Here Appellee asserts "this reserve is merely a bookkeeping entry, there is no segregation or trust-funding of assets for this reserve liability" (Opp. Brief, 16). If so, can Wisconsin have any interest in requiring the company to overstate its obligations and understate its assets in other states? Is this the substance underlying five years of litigation in this case? Is this the substance giving rise to the claimed Wisconsin interest? If only a bookkeeping entry is involved, then Wisconsin's claimed concern can be satisfied by simply dividing the amount of membership fees collected in any six months' or yearly period by two, thereby determining whether or not appellant "has such an asserted surplus" (Opp. Brief, 18) without the necessity of permitting Wisconsin to dictate the meaning of "premium" nationally and thereby enabling appellant to reflect its assets and liabilities truthfully and interstate commerce to continue freely.

While thus trying to minimize the effect of the Wisconsin requirement, elsewhere, in protean fashion, he asserts a different concept. His own Supreme Court to the contrary notwithstanding, he says that "the purpose of this reserve is to measure the entire future contingent liability on unexpired risks" (Opp. Brief, 14), that "this statute is a recognition by the legislature of Wisconsin that during the unexpired terms of policies the company has a risk liability" (Opp. Brief, 16). Throughout his brief, he loosely refers to the statute as one designed for the protection of Wisconsin residents. Will mere bookkeeping protect Wisconsin's residents?

Even his own authorities do not support his claim that there is no "trust-funding of assets for this reserve lia-

bility". Thus, in speaking of this reserve, Huebner in "Property Insurance", new edition 1922, regards the reserve "as a sum held in trust by the company for its policyholders" (pp. 217-218). Huebner further says that all reasons advanced for the existence of this reserve "are untenable except that which regards the reserve as consisting of a sum equal to the unearned portion of the company's premium income to be held in trust for the exclusive benefit of the policyholders" (P. 218). Messrs. Riegel & Loman in "Insurance Principles and Practices", Third Edition, 1924, say that "this reserve is a trust fund, and in that respect is very similar to the reserve held by life insurance companies" (p. 246). That reserves are trust funds in Wisconsin is conclusively demonstrated by Section 201.05(2)(e) of its statutes in dealing with the purposes for which a company may be formed, specifying that "there be maintained separate and distinct reserves in trust for each kind of insurance so written". (See App. I This reply). The Wisconsin Court in its former opinion specifically said "that reserves shall be set up against this 'premium' and that specified portions of the premium indicated in the statutory tables shall be returned as unearned upon the cancellation of the insurance". (*Duel* v. *State Farm Mutual Automobile Insurance Co.*, 240 Wis. 161, 177). This trust fund concept of an unearned premium reserve is exactly our argument. (Crobaugh, Handbook of Insurance, p. 1143; Orig. Br. 15, 23).

Is the creation of a trust fund mere bookkeeping? Is it mere bookkeeping when appellant to conform must take what absolutely belongs to it in 36 states as membership fees and on which no liability to return any part thereof attaches by virtue of contract or the laws of those states, and impress one-half of it with a trust to secure a liability non-existent? One-half of the membership fees collected in 1942 would aggregate over $815,000. Is it mere bookkeeping to so appropriate this sum from the com-

pany's free assets, freeze it to secure a non-existent liability,—property which, under the laws of those states, may be devoted to the prosecution of interstate commerce, to the payment of obligations arising in that commerce,—property which may be lawfully expended in those states for the purpose of investigating the insurability and desirability of new risks, for compensation for obtaining new business, and application to exigencies incident to the transaction of any lawful business of the company?

(d) Assuming, but not admitting, appellee's argument in all its phases, the claimed state power must yield to the superior national interest if commerce is to be free.

But assuming the Wisconsin argument that there is present here a legitimate local interest as indicated, (and this we do solely for the purpose of argument), it by no means follows and nowhere did we concede that Wisconsin in the claimed protection of such local interest could project its legislation extraterritorially. In fact we argued the opposite (Orig. Br. 19 *et seq.*) No case is cited by appellee granting such extension of power. In all the cases cited by appellee under this point (Opp. Br. 30-34), except the *Hoopeston* case (Opp. Br. 31-32), the regulations approved sought merely to regulate matters within the state. Hoopeston dealt with due process and not commerce. We concede to Wisconsin the right to define premium as it chooses on business transacted within its boundaries. But is the state interest so impelling that it compels rejectment of the competing demands of the other states, to say nothing of the national interest? Is there no room for "a little play in its joints"? Focusing consideration upon the fluid field of commerce, are we to assume that the other states are so impervious to the interests of their own citizens that the claimed local interests of one shall be projected to protect

the interests of all? As Mr. Justice Jackson pertinently observed in *Duckworth* v. *Arkansas*, 314 U. S. 390, on p. 401:

> "Our national free intercourse is never in danger of being suddenly stifled by dramatic and sweeping acts of restraint. That would produce its own antidote. Our danger, as the forefathers well knew, is from the aggregate strangling effect of a multiplicity of individually petty and diverse and local regulations. Each may serve some local purpose worthy enough by itself. Congress may very properly take into consideration local policies and dangers when it exercises its power under the commerce clause. But to let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national society. It is the movement and exchange of goods that sustain living standards, both of him who produces and of him that consumes. This vital national interest in free commerce among the states must not be jeopardized."

As we read appellee's argument, it is that if the asserted state power be not a denial of due process, "it is because the subject of regulation is sufficiently localized as to be a proper subject of exercise of the state police power" and, therefore, "a legitimate subject of local concern," and, therefore, "subject to local regulation even though it be interstate commerce provided the control exerted is not to *prohibit* interstate commerce but to "*regulate it*" (emphasis supplied) (Opp. Br., 32). Boiled down it is that if there is no denial of due process, the police power is established. Being established, interstate commerce may be "regulated" but not "prohibited," and this regardless of whether the regulation reaches out beyond the borders of the regulating state. Essentially this is Wisconsin's thesis.

Unanswered is our argument that if Wisconsin can thus project its laws beyond its borders and thereby require national conformance to them as a condition of commercial enterprise within, any one of the other states can with equal right do likewise (Orig. Br. 13). Adumbrant of such enervating effect upon commerce certain to follow from a premise so parochial in range are the retaliatory statutes of the several states, marshalled here (App. I (A); Orig. Br. 53, *et seq*), which likewise receive silent treatment. Unanswered also is our argument that Wisconsin's doctrine has "sinister implications" (Orig. Br. 23, *et seq*).

Substantially the same argument as that made by Wisconsin here was made in *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557 (Orig. Br. 19, 20), a case which likewise receives silent treatment. It was rejected there, as it should be rejected here for reasons stated by Mr. Justice Miller there (Orig. Br. 20), and for the further reason that it ignores the doctrine of this Court, namely, that the question is "whether, in each case, the competing demands of the state and national interests involved can be accommodated" (Black, J., in *U. S.* v. *S.E.U.A.*, 322 U. S. 533, 548), and for the other reasons argued in our brief (Orig. Br. 13, *et seq.*).

Due process and interstate commerce are not synonymous concepts governed by identical rules because of their obvious differences in character. Due process deals with the denial of private rights. Interstate commerce deals with public rights, national interests of impelling supreme concern. When one thinks of interstate commerce, a broad panorama opens, objectively demonstrable. Some saw it as a covered wagon, others a locomotive, yet others as an aeroplane, still others the transmission of information or an electrical impulse. It has meant manufacturing, industry, trade, and now insurance. It is so generic that

it cannot be "delineated by a simple, abstract, definition." Great judges of this Court have alluded to it metaphorically: a stream. It is no mere accident of geography or race that this nation has risen to its pre-eminent position in the world of today. As much as any other, it is because the "mutual jealousies and aggressions of the states" have been denied by the force of that great Clause, thereby assuring the free and easy flow of commerce among them. Great judges of this Court have protected that Clause from the assaults of provincial principalities. It is now too late to retreat and give effect to a doctrine which will permit the states to "go on suffocating and retarding and Balkanizing American commerce, trade and industry" (Jackson, J. in *Duckworth* v. *Arkansas*, 314 U. S. 390, 400), as they have done to the business of insurance under the concept of intrastate commerce (App. I, (A)(B); Orig. Br. 45, *et seq.*).

II.

THE STATUTE AS CONSTRUED AND APPLIED DENIES DUE PROCESS.

While the greater part of this Reply centers about the commerce clause, this is due to the extended treatment of that subject by appellee and not to the lack of importance we attach to Due Process or Full Faith and Credit. Due process, and this with all deference, receives a rather cursory treatment at his hands. Viewing the subject in the light of due process, the character and extent of appellant's activities, whether interstate or intrastate, becomes inapposite. The question under due process at bar is not one of degree or accommodation, as it is under commerce; it is one of right, whether the legislation "goes beyond any legitimate interests of the state" (Holmes, J., in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435; Orig. Br. 36, 37).

Having this principle in mind, we find that appellee again asserts his overall solvency theme (Opp. Br. 36) and concludes his argument with the inaccurate observation that appellant's "development and expenditure" in Wisconsin was "without compliance with the Wisconsin statutory regulations and while it has been operating therein under the injunctions as previously stated" (Opp. Br. 37), ignoring that appellant initially entered the state under a license permitting the use of its membership fee plan and had in Wisconsin at the time of the acts complained of herein, an administrative office, 500 agents, 25,000 risks in force, an annual premium income in excess of $400,000.00, and had expended in excess of $25,000.00 in development (Orig. Br. 29, R. 108, 109). Ignored also is the rule that thereby appellant became entitled to the protection of due process "against a subsequent application to it of State law" (*Conn. Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 80; Orig. Br. 30).

As to the overall solvency theme, we answer that it is as incongruous as the Boston Symphony playing Alexander's Rag Time Band. We repeat again that the statute serves a special limited purpose, as the Wisconsin Supreme Court twice advised us, namely, to secure the "discharge of the company's obligations to refund unearned premiums" (240 Wis. 161, 178; R. 139). Therefore, before the statute can have any application there must exist: (1) a premium; and (2) the obligation to return a part thereof as unearned,—premises nonexistent as to the subject over which Wisconsin seeks to superimpose this special limited statute. Not only that, but the subject over which it thus seeks to apply its statute relates not to Wisconsin transactions, but to transactions consummated elsewhere. It seeks to make that a premium which is not a premium by the laws of the state of occurrence. It seeks to fix a contingent liability where none exists

or could exist. Where is there here "any legitimate interest(s) of the state"? (Orig. Br. 31, *et seq.*).

Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426, which we submitted as decisive (Orig. Br. 36), is ignored. So are our other cases (Orig. Br. 33, 35, 36) except *Conn. Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77 (Orig. Br. 34). It is disposed of by the curt statement that its only relevancy "is that it did involve insurance companies," and that "all it holds is that a state may not tax a foreign corporation where neither the tax in its measure nor in its incidence was related to state transactions" (Opp. Br. 35). Are we, therefore, to assume that a state may create a contingent liability under a contract where none exists where the contract neither "in its measure nor in its incidence was related to state transactions"? We think not.

Yet, Wisconsin proposes exactly that, for, in the instant opinion, its Court said (R. 138):

> "We unquestionably decided in the former case that membership fees exacted by the company from its policyholders are a part of the premiums paid by them, and that before the company could have a license to do business in this state it had to set aside a reserve comprising fifty per cent of what it designated as premiums and fifty per cent of the membership fees, in order to meet the requirement of sec. 201.18 (1)."

That appellant was willing to comply, as to business transacted in Wisconsin, was unavailing (R. 138).

Thus, Wisconsin proposes to take money belonging to appellant in 36 other states on business transacted there, convert it into a trust fund for the benefit of policyholders to secure a "contingent" liability nonexistent anywhere, and this in the face of the provisions of contracts lawfully executed recognizing the money as the money of appellant without any liability to return a part thereof attaching

thereto (Orig. Br. 31). This trust fund must be maintained for those who by their contracts and the law of their residence have no claim thereto. Neither have any residents of Wisconsin for they paid no part of it, the "contingent" liability of the company to repay to them any moneys paid by them as premiums being amply secured by reserves set up conformably to the law of their state. Wisconsin's doctrine thus distorts the financial structure of appellant by requiring it to overstate its liabilities and understate its assets, inferentially proscribed as violative of due process by Mr. Justice Cardozo in this Court's opinion in *Am. Tel & Tel. Co.* v. *U. S.*, 299 U. S. 232, 240.

Where are Wisconsin's legitimate interests here? Isn't it idle to talk of "no attempt to exert any authority beyond the state border" (Opp. Br. 36), when words are laid aside and substance dissected and examined? We argue substance, not dialectics. How are Wisconsin's interests so affected as to give it "the power it claims" (*Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 316; Orig. Br. 36). Isn't there here present a clear absence of legitimate state interest and a clear attempt to foist Wisconsin law upon contracts which neither "in their measure nor . . . incidence" are related to Wisconsin transactions"? (Orig. Br. 35, *et seq.*).

III.

THE STATUTE AS CONSTRUED AND APPLIED VIOLATES FULL FAITH AND CREDIT.

With all deference, our argument here receives scarcely passing attention. Cases which we argued under commerce, *Baldwin* v. *Seelig*, 294 U. S. 511, and *Covington, etc.* v. *Kentucky*, 154 U. S. 204 (Orig. Br. 20, 21), are referred to here by appellee as "not remotely in point" (Opp. Br. 38). While we are compelled to admit that

they are not in point under Full Faith and Credit, not being there cited by us, we resist his statement that "these attempts were made to control what was done in other states" (Opp. Br. 38), with its obvious inference that the attempts were direct ones. Like Wisconsin here they were veiled ones. Mr. Baldwin did not object to the purchase of milk in Vermont, he did not object to its importation or consumption in New York by the importer. All he objected to was its sale there. The importer, who bought it for sale, could drink it, couldn't he? (Orig. Br. 26). The same is true of Covington (Orig. Br. 20).

But be that as it may, the basic premise of his argument is that if our "contention here were sound then the other states could not only determine and fix liabilities and rights of a company but could bind the hands of the legislature of Wisconsin so it could not effectively legislate in respect to its own affairs" (Opp. Br. 39). Conversely he claims here that Wisconsin should be permitted to do what he so strongly objects to having the other states do, namely, to fix and define premiums for business transacted elsewhere, ignoring the fact that Wisconsin is here permitted its own definition of premium as to business transacted within its borders. This is exactly where Full Faith and Credit enters.

As we argued in our original brief, all we are insisting upon is that Wisconsin accord that full faith and credit to rights created by transactions or proceedings occurring without its borders as is accorded in states of occurrence. (Compare *Sovereign Camp W. W. v. Bolin*, 305 U. S. 66, 75.) If Wisconsin is required so to do, then the others are required to do likewise, not only as to Wisconsin, but as to each other, and thereby Full Faith and Credit, "like the commerce clause" becomes "a nationally unifying force" altering the status of the states as independent foreign sovereignties "*each free to ignore rights and obligations created under the laws or established by the judi-*

cial proceedings of the others," but requiring nationwide application and acceptance of such rights (Stone, C.J., in *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 439; Orig. Br. 41).

We don't now and never did argue that this rule is inflexible (Orig. Br. 42). We agree that it should be "allowed a little play in its joints" (Opp. Br. 30). Wisconsin "may cite scripture for his purpose." Unmask Wisconsin's argument and can anything be more rigid, more mummified? It need not accord faith and credit to anyone. "The scale of decision," according to its weight, should be turned in favor of appellant (Orig. Br. 42, 43).

CONCLUSION.

Appellant is the largest exclusive writer of automobile insurance in the world (R. 54) with assets of $29,632,845.47 as of December 31, 1942. Its liabilities then were $20,637,863.07 which include a voluntary and unassigned contingency reserve of $4,000,000. Its net free surplus then available for any contingency was $8,994,982.39, which surplus it had accumulated through its sound rate structure and profitable underwriting experience since 1922, the year it began business (R. 102). Its financial position is even stronger today (Bests, Reproduction of Principal Schedules from Casualty and Surety Statements, 1944, pp. 1150-1151).

It now finds itself faced with a denial of renewal of license, ostensibly because of its refusal to comply with a Wisconsin statute which would require it to set aside a reserve as a trust fund to secure a liability non-existent. In this Court it finds the Wisconsin Insurance Commissioner disagreeing with the Wisconsin Supreme Court as to the meaning and purpose of the statute interposed to bar its future business life in that state. It also finds

that Commissioner arguing on the one hand that appellant's solvency is unknown until compliance with the statute is had (Opp. Br. 18), and, on the other, that the requirement is a mere bookkeeping transaction (Opp. Br. 16), conceding all the while that Wisconsin "has not claimed that appellant is insolvent" (Opp. Br. 18).

Necessarily, in view of appellant's financial condition, and its rise to its preeminent position in the industry, one wonders what the real purpose is. Could it conceivably be economic retaliation, rivalry, reprisal or requital (*Baldwin* v. *Seelig*, 294 U. S. 511) now riding the range of insurance? (App. I (A) (B); Orig. Br. 45, *et seq.*). What other inference is there in a case where other ample statutory authority exists in Wisconsin, as we have pointed out (*Ante*, pp. 2, 7), enabling Wisconsin to require appellant to set aside adequate reserves for all liabilities, and possess in addition thereto, a minimum surplus of $50,000.00, thereby insuring appellant's soundness, thereby protecting Wisconsin citizens with whom it seeks to continue its dealings, thereby permitting interstate commerce its free flow unburdened and thereby also observing due process and full faith and credit.

Therefore, for the reasons argued in this and in our original brief, we again respectfully submit that the judgments of the Supreme Court of Wisconsin be reversed.

Respectfully submitted,

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Ekern, Meyers & Matthias,
Of Counsel.

Chicago, Illinois, January 8, 1945.

APPENDIX I.

Wisconsin Statutes 1943.

Sec. 204.27 *Reserve Liability.* In computing the reserve liability of casualty insurance and surety corporations the commissioner shall make such calculations as in his judgment are equitable and just to both policyholders and the company; provided, that such liability so determined shall not be less than fifty per cent of the premiums written in the company's policies.

Sec. 204.28 *Employers' Liability Reserves, Computation, Allocation, Definitions.* (1) the reserve for outstanding losses under insurance against loss or damage from accident or injuries to any person and for which the insured is liable shall be computed as follows as of the date of computation:

(a) For all liability suits being defended under policies written more than ten years prior to that date, one thousand five hundred dollars for each suit; and for more than five and less than ten years prior thereto, one thousand dollars for each suit; and for more than three and less than five years prior thereto, eight hundred and fifty dollars for each suit.

(b) For all liability policies written during the three years immediately preceding such date, such reserve shall be sixty per centum of the earned liability premiums of each of such three years less all loss and loss expense payments made under liability policies written in said years; but in any event, such reserve shall, for the first of such three years be not less than seven hundred and fifty dollars for each pending suit on said year's policies.

(c) For all compensation claims under policies written more than three years prior to such date, the present values at four per centum interest of the determined and the estimated future payments.

(d) For all compensation claims under policies written in the three years immediately preceding said date, such reserve shall be sixty-five per centum of the earned premiums of each of such three years, less all loss and loss expense payments made in connection with such claims under policies written in the corresponding years; but in any event, for the first year of such three-year period such reserve shall be not less than the present value at four per centum interest of the determined and the estimated claims under policies written during such year.

(2) (a) As used in this section, the term "earned premimums" shall include gross premiums charged on all policies, including all determined excess and additional premiums, less return premiums other than premiums returned to policyholders as dividends and less reinsurance premiums and premiums on policies canceled and less unearned premiums on policies in force. But any participating company which has charged in its premium a loading in excess of its average expense requirements shall not be required to include such loading in its earned premiums; provided, the amount of such loading is approved by the commissioner.

(b) The term "compensation" relates to all insurance providing compensation to employes for personal injuries, irrespective of fault of the employer. The term "liability" relates to all insurance except compensation insurance against loss or damage from accident to or injuries suffered by an employe or other person and for which the insured is liable.

(c) The terms "loss payment" and "loss expense payments" include all payments to claimants, payments for

medical and surgical attendance, legal expenses, salaries and expenses of investigators, adjusters and fieldmen, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employes, home office expenses, and all other payments made on account of claims, whether such payments shall be allocated to specific claims or unallocated.

(3) All unallocated liability loss expense payments made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies shall be distributed as follows: Thirty-five per centum shall be charged to the policies written in that year; forty per centum to the policies written in the preceding year; ten per centum to the policies written in the second year preceding; ten per centum to the policies written in the third year preceding; and five per centum to the policies written in the fourth year preceding, and such payments made in each of the first four calendar years in which an insurer issues liability policies shall be distributed as follows: In the first calendar year one hundred per centum shall be charged to the policies written in that year, in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year, in the third calendar year forty per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, and twenty per centum to the policies written in the second year preceding, and in the fourth calender year thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, fifteen per centum to the policies written in the second year preceding, and ten per centum to the policies written in the third year preceding, and a schedule showing such distribution shall be included in the annual statement.

(3a) All unallocated compensation loss expense payments made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed as follows: Forty per centum shall be charged to the policies written in that year, forty-five per centum to the policies written in the preceding year, ten per centum to the policies written in the second year preceding and five per centum to the policies written in the third year preceding, and such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed as follows: In the first calendar year one hundred per centum shall be charged to the policies written in that year, in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year, in the third calendar year forty-five per centum shall be charged to the policies written in that year, forty-five per centum to the policies written in the preceding year, and ten per centum to the policies written in the second year preceding and a schedule showing such distribution shall be included in the annual statement.

(4) Whenever in the judgment of the commissioner the liability or compensation loss reserves of any insurer, calculated in accordance with the foregoing provisions, are either inadequate or excessive, he may, in his discretion require or permit such insurer to set up reserves based upon estimated individual claims or such other basis as he may approve.

(5) Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the commissioner may prescribe. [*1933 c. 487 s. 155; 1937 c. 219*]

Sec. 201.05 *Stock or mutual plan; Purposes; Separate olicies; Automobile Insurance.* (1) * * *

(2) No company shall be formed for the purpose of engaging in any other kind of insurance than that specified some one of the subsections of section 201.04, or more nds of insurance than are specified in a single subsection, xcept that a company may be formed: * * *

(e) For any or all of the purposes specified in section 01.04, whether by retrocession, reinsurance, or direct insurance, provided there be maintained separate and distinct reserves in trust for each kind of insurance so ritten.

Sec. 201.18 *Reserves, basis for.* (1) * * *

(2) Where no other provision is made therefor by law, e reserves of any insurance company shall be calculated pon such basis, method and plan as shall fully provide for l liabilities, and any basis, method and plan fixed by the rder of the commissioner shall be prima facie just, reaonable and proper.

(Appendix II Follows)

INVESTMENT EXHIBIT

				Gain in Surplus	Loss in Surplus
42.	Brought forward			$3187465518	

INTEREST, DIVIDENDS AND RENTS

43.	Interest, dividends and rents received during the year, per item 30, page 2, less item 58, page 3, and less $ amortization and plus $ accrual	$7755035			
44.	Deduct interest, dividends and rents due and accrued December 31 of previous year, per item 46 of last year's exhibit	1105750			
45.	Balance	7176306			
46.	Add interest, dividends and rents due and accrued December 31 of current year, per item 38, page 4, less the sum of item 35, page 5, and item 53B, page 4	1131706			
47.	Add interest and rents paid in advance December 31 of previous year, per item 40 of last year's exhibit				
48.	Total	$8307993			
49.	Deduct interest and rents paid in advance December 31 of current year, per liability exhibit, page 5				
50.	**Gross interest, dividends and rents earned during the year**		$8307993		

INVESTMENT EXPENSES

51.	(c) Investment expenses paid during the year, per disbursement exhibit, page 3. (Attach exhibit)				
	Line 41+49 Page 3	1527905			
	1/2% Mortg. Assets	778650			
		7840655			
52.	Deduct investment expenses unpaid December 31 of previous year, per item 54 of last year's exhibit	1386300			
53.	Balance	1771355			
54.	(a) Add investment expenses unpaid December 31 of current year, per liabilities exhibit, page 5, viz:—	1750000			
55.	**Investment expenses incurred during the year**		1847355		
56.	**Net interest, dividends and rents earned during the year**			6460947	

PROFIT ON INVESTMENTS

57.	Gain from sale of ledger assets, per item 38, page 2	1046396			
58.	Gain from increase in book value of ledger assets, other than for accruals, per item 39, page 2	2747156			
59.	Gain from change in difference between book and market value during the year				
60.	Gain from other investments, viz:—(Give items and amounts)				
61.	**Profit on investments during the year**		3793552		

LOSS ON INVESTMENTS

62.	Loss from sale of ledger assets, per item 60, page 3	997073			
63.	Loss from decrease in book value of ledger assets, other than for amortization, per item 61, page 3	1357659			
64.	Loss from change in difference between book and market value during the year Canadian Assets	530000			
65.	Loss from other investments, viz:—(Give items and amounts) Depreciation on Real Estate	310314			
66.	**Loss on investments during the year**		7119316		
67.	(b) Gain from investment profit and loss items			1674236	
68.	(b) Gain from investments during the year				$13541113
69.	Total gains and losses from underwriting and investments				3996207 01

MISCELLANEOUS EXHIBIT

		Gain in Surplus	Loss in Surplus
70.	Dividends declared to stockholders during the year		
71.	Dividends declared to policyholders during the year		1669938 6
72.	Remittances from home office (gross)		
73.	Remittances to home office (gross)		
74.	Increase in special reserves + Guaranty Fund		17500000 00
75.	(a) Line 33 Page 4	3099569	
76.	" 54 " 3		676567
77.			
78.	Net (b) Loss from items 70-77		1444965432
79.	Total gains and losses in surplus during the year		3996207 01 1444965432
80.	Surplus December 31 of previous year, per item 81 of last year's exhibit		6197429 67

	[illegible]	1876130			
52.	Deduct investment expenses unpaid December 31 of previous year, per item 54 of last year's exhibit	1386300			
53.	Balance	1770355			
54.	(a) Add investment expenses unpaid December 31 of current year, per liabilities exhibit, page 5, viz:—	1750000			
55.	**Investment expenses incurred during the year**		1847035 55		
56.	**Net interest, dividends and rents earned during the year**			6460894 7	
	PROFIT ON INVESTMENTS				
57.	Gain from sale of ledger assets, per item 38, page 2	1046396			
58.	Gain from increase in book value of ledger assets, other than for accruals, per item 39, page 2	2747546			
59.	Gain from change in difference between book and market value during the year				
60.	Gain from other investments, viz:—(Give items and amounts)				
61.	**Profit on investments during the year**		3793548 7		
	LOSS ON INVESTMENTS				
62.	Loss from sale of ledger assets, per item 60, page 3	397907 3			
63.	Loss from decrease in book value of ledger assets, other than for amortization, per item 61, page 3	435760 59			
64.	Loss from change in difference between book and market value during the year. Foreign Assets	53700 00			
65.	Loss from other investments, viz:—(Give items and amounts) Depreciation on Real Estate	310394 4			
66.	**Loss on investments during the year**		1190316		
67.	(b) Gain **from investment profit and loss items**			1674516 6	
68.	(b) Gain **from investments during the year**				8135411 3
69.	Total gains and losses from underwriting and investments				3996707 01
	MISCELLANEOUS EXHIBIT		Gain in Surplus	Loss in Surplus	
70.	Dividends declared to stockholders during the year				
71.	Dividends declared to policyholders during the year			1669938 6	
72.	Remittances from home office (gross)				
73.	Remittances to home office (gross)				
74.	Increase in special reserves + Guaranty Fund			17500000	
75.	(a) Line 33 Page 4		3099569		
76.	" 54 " 3			6456 67	
77.					
78.	Net (b) Gain from items 70-77				[illegible]
79.	Total gains and losses in surplus during the year				3996707 01
80.	Surplus December 31 of previous year, per item 81 of last year's exhibit			6197496 67	
81.	Surplus December 31 of current year, per item 50, page 3			7294555 77	
82.	Increase in surplus during the year (enter in column to balance)				1097059 10
83.	Totals				3996707 01
84.	Per cent. of losses incurred to premiums earned 43.91		60.35 (Note)		
85.	Per cent. of loss adjustment expenses incurred to premiums earned 16.44				
86.	Per cent. of underwriting expenses incurred to premiums earned 27.43				
87.	Per cent. of investment expenses incurred to gross interest, dividends and rents earned 22.73				

(Note) Not in annual report. Sum of Items 84 and 85 showing total loss experience for 1942

(a) Give statement number of each item or portion thereof included herein.
(b) Write "Gain" or "Loss".
(c) Include in this item one-eighth of one per cent. of the mean invested assets; repairs, expenses and taxes on real estate; such other taxes and fees as apply to investments and personal property only; and such other items, if any, as are known to apply exclusively to the assets of the company.

SCHEDULE T– PART 1—EXHIBIT OF PREMIUMS WRITTEN
Allocated by States and Territories

(May be filed not later than March 15th)

States, etc.	Gross Premiums, Including Policy and Membership Fees, Less Return Premiums and Premiums on Policies Not Taken					Net Premiums	Dividends Paid or Credited to Policyholders, less Received on Reinsurance
	Reinsurance Assumed From			Reinsurance Ceded To			
	Direct Writings	Unauthorized Companies	Authorized Companies	Unauthorized Companies	Authorized Companies		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Alabama							
Alaska							
Arizona							
Arkansas							
California							
Colorado							
Connecticut							
Delaware							
Dist. Columbia							
Florida							
Georgia							
Hawaii							
Idaho							
Illinois							
Indiana							
Iowa							
Kansas							
Kentucky							
Louisiana							
Maine							
Maryland							
Massachusetts							
Michigan							
Minnesota							
Mississippi							
Missouri							
Montana							
Nebraska							
Nevada							
New Hampshire							
New Jersey							
New Mexico							
New York							
No. Carolina							
No. Dakota							
Ohio							
Oklahoma							
Oregon							
Pennsylvania							
Rhode Island							
So. Carolina							
So. Dakota							
Tennessee							
Texas							
Utah							
Vermont							
Virginia							
Washington							
West Virginia							
Wisconsin							
Wyoming							
Canada							
Cuba							
Porto Rico							
Philippine Is.							
Mexico							
Other foreign (Russia)							
Ontario Canada							

FILE COPY

JUN 1 1944

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN E. MARTIN,
Attorney General of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

(Case No. 3.)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

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vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Respondent.

(Case No. 4.)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Respondent.

APPEAL FROM SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEE'S STATEMENT OPPOSING JURISDICTION.

Pursuant to Paragraph 3 of Rule 12 of the Rules of the United States Supreme Court, appellee files this statement

opposing appellate jurisdiction. This statement is made and filed as applicable to both of the above captioned matters.

The appellant, State Farm Mutual Automobile Insurance Company, an Illinois corporation, filed a single petition for allowance of appeal captioned in both of the above entitled cases. With it was filed likewise a statement of jurisdiction similarly captioned, and a single order likewise captioned was entered by Hon. Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin, on April 28, 1944, allowing the same. Other papers requisite to appeal were likewise filed and captioned in both matters. Accordingly this statement is similarly captioned and made applicable to both. The parties, by stipulations captioned in both matters and filed with the Clerk of the Supreme Court of the State of Wisconsin have designated the parts of the record to be transmitted to this court and that a single companion record may be so transmitted combining both of the above-entitled matters on appeal to this court.

Nature of the Case.

This appeal is, or if it be deemed there are two appeals they are, from judgments of the Supreme Court of the State of Wisconsin affirming the denials of annual licenses of the appellant to do an insurance business in the State of Wisconsin during the license years May 1, 1942 to April 30, 1943 and May 1, 1943 to April 30, 1944, respectively. The decision of the Wisconsin Supreme Court in the matters dated January 18, 1944 is reported *State Farm Mutual Automobile Insurance Co.* v. *Duel*, 244 Wis. 429 (Adv. Sh.) 12 N. W. (2) 696, and motion for rehearing was denied on March 14, 1944.

Said judgments of the Supreme Court of Wisconsin entered pursuant to such decision affirmed judgments of the

dismissing actions commenced by the appellant to enjoin the appellee Commissioner of Insurance of the State of Wisconsin from interfering with the appellant doing business in the State of Wisconsin during said license years and to compel him to issue to it licenses for such years. The refusal of the appellee Commissioner of Insurance of the State of Wisconsin to issue licenses to the appellant for such years is based upon the failure of the appellant to comply with Section 201.18 of the Wisconsin Statutes requiring every insurance corporation doing business in Wisconsin to set up and maintain an unearned premium or re-insurance reserve in respect to all premiums and show the same as a liability in the annual statement it is required to file with the appellee each year.

The appellant during the license years involved set up on its books and maintained such unearned premium or reinsurance reserve in respect to all premiums collected by it except life membership fee premiums, the appellant continuing the use of the life membership fee plan of insurance outside of the State of Wisconsin during such years. The Supreme Court of Wisconsin in its decision in the instant cases held that the provisions of Section 201.18 Wisconsin Statutes require that an unearned premium or reinsurance reserve be set up and maintained in respect to *all* premiums (including life membership fee premiums) on *all* policies and that in order for an insurance company, foreign or domestic, to do business in Wisconsin it must comply with the reserve requirements of such statute as so construed. Accordingly it affirmed the denial of the licenses to appellant for the license years involved because the appellant, by not having any reserve set up in respect to life membership fee premiums it had collected, had not complied with the requirements of this section and therefore was not entitled

The appellant here, as it did in the Supreme Court of Wisconsin, contends that as so applied the provisions of Section 201.18 of the Wisconsin Statutes are violative of the due process, impairment of contract, and full faith and credit provisions of the Constitution of the United States. The Supreme Court of Wisconsin addressed itself to such contentions and expressly held that they are without merit.

Statutes Involved.

The provisions of Section 201.18 of the Wisconsin Statutes here under attack are as follows:

> "201.18 *Reserves, basis for.* (1) The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by section 201.50.
>
> "(2) * * *"

Of importance as related to the question of the validity of the above provision are the following provisions of the Wisconsin Statutes, now in force:

> "201.32 *Foreign companies; admission.* (1) No foreign insurance company shall directly or indirectly transact any insurance business in this state except upon compliance with the requirements of this section.
>
> "(2) * * *
>
> "(3) A mutual company shall satisfy the requirements as to solvency and the limitations as to expenses exacted of like domestic companies.

"(4) The foreign company shall file a declaration that it desires to transact insurance in this state, and that it will accept a license therefor to terminate in case it shall violate or fail to comply with any provision of law, or in case its capital shall be impaired to the extent of twenty per cent, and shall not be made good within such time as the commissioner shall require, if such commissioner shall declare its license revoked therefor.

"(5) * * *

"(6) * * *"

"201.34 *License; visitation; foreign companies.* (1) The commissioner shall upon being satisfied by investigation that any insurance company applying for license or relicense has fully complied with all provisions of law, and that its methods and practices in the conduct of its business and the character and value of its assets are such as to safeguard the interests of its policyholders and the people of the state, issue to such company a license to transact business in this state, and shall renew the same from year to year so long as such company shall meet all requirements of law; and shall give to every agent of such company a certificate that such company has complied with all the provisions of law and is authorized to transact business in this state, which license to the company and certificate to agents shall continue in force until the first day of May next after the effective date thereof, unless sooner revoked.

"(2) The commissioner shall have the same supervision and make the same examination of the business and affairs of every licensed foreign insurance corporation as of domestic corporations doing the same kind of business, and of its assets, books, accounts and general condition. * * *

"(3) * * *

"(4) * * *".

"201.50 *Reports to commissioner, forms, contents, penalties.* (1) Every insurance company shall annu-

ally by March first file with the commissioner a sworn statement concerning its affairs for the preceding calendar year, upon such forms and including such information as shall be prescribed by him. The statement of any company organized under the laws of any foreign country shall set forth its business and affairs in the United States, verified by its resident manager in the United States. The commissioner shall prepare forms of annual statement for the various kinds and classes of insurance companies and societies, suitable for eliciting a true and complete exhibit of the financial condition, character and methods of each company or society, and he shall include in such forms, requisition for information upon all important elements of business transacted in each kind and class of insurance, including gain and loss, and any matter, condition or requirement imposed by law and tending to a strict accountability of the management. The commissioner shall furnish annual statement blanks to the insurance companies and societies, and shall cause the information contained in the annual statements to be arranged in convenient form and published in his annual report.

"(2) No company or society shall be relicensed until such annual statement has been so filed and all other provisions of the law complied with; provided, the commissioner may extend the time for filing such annual statement to March thirty-first. • • •"

"206.55 *Insurers to comply with law.* No insurance company shall do any insurance business or make any guaranty, contract or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder, or the like, in this state or with any resident of this state except according to the conditions and restrictions of the statutes of this state."

Statement of Facts.

For many years prior to 1939 the appellant, State Farm Mutual Automobile Insurance Company, an Illinois corpo-

ration, had endeavored to obtain a license to do an automobile insurance business in Wisconsin, but the various Commissioners of Insurance consistently took the position that its methods were such that it could not and did not comply with the provisions of the Wisconsin statutes regulating insurance and refused to license it. In 1939 application was made to the then Commissioner of Insurance, who took a contrary position and on July 13, 1939, issued it a license as a foreign insurance company to do all forms of automobile insurance business in Wisconsin upon the life membership fee plan for the license year commencing May 1, 1939, and expiring April 30, 1940. This was the first time the appellant did any busines in the state and the first and only license it has ever had to do so.

In the course of matters the appellee, Morvin Duel, the present Commissioner of Insurance, after his appointment and qualification on September 27, 1939, addressed himself *inter alia* to the legality of appellant carrying on its insurance business in the state and concluded that its plan of insurance was contrary to the Wisconsin statutes. Accordingly when appellant applied in due course for renewal of or issuance of a license for the next license year, May 1, 1940, to April 30, 1941, he refused to grant or issue it a license because *inter alia* it did not satisfy the requirements of the Wisconsin statutes. His position in this regard was confirmed by the decision of the Wisconsin Supreme Court in *Duel* v. *State Farm Mutual Automobile Ins. Co.* (March 13, 1942) 240 Wis. 161, 1 N. W. (2) 887, 2 N. W. (2) 871.

The appellant then abandoned the use of the life membership fee plan of insurance in Wisconsin, but continued to use it in other states in which it does business and applied for the license year May 1, 1942 to April 30, 1943, using a level premium plan in Wisconsin. The appellee refused to grant such license because *inter alia* it did not set up and maintain, and show in its annual statement, *any* unearned

premium or reinsurance reserve, as required by Section 201.18 Wisconsin Statutes, in reference to life membership fee premiums, his contention being that this statute requires such reserve be set up and shown in respect to *all* premiums (which includes life membership fees) as a requirement to obtaining a license to do business in the state.

Appellant then on May 20, 1942 commenced an action in the Circuit Court for Dane County, State of Wisconsin, against the appellee, Morvin Duel, as Commissioner of Insurance, to enjoin him from interfering with its doing business in the state, and to compel the issuance to it of a license, for the license year May 1, 1942 to April 30, 1943. The appellee answered and following a state practice provision moved for summary judgment dismissing said action upon the merits.

Before decision was reached on this motion another license year, May 1, 1943 to April 30, 1944 had come around, and there being no change as respects the matters involved, the appellee similarly refused to issue a license for that year for the same reasons. Appellant then commenced another like action in the Circuit Court for Dane County. By stipulation the motion for summary judgment in the 1942 action was made applicable to this 1943 case. The Circuit Court on July 3, 1943 granted the appellee's motions in both cases and entered judgments dismissing them and vacating the injunctions *pendente lite* in the cases.

Appellant, State Farm Mutual Automobile Insurance Co., then took separate appeals to the Supreme Court of Wisconsin from these judgments. The cases were briefed, heard and decided together. The Supreme Court of Wisconsin rendered its decision January 18, 1944 reported 244 Wis. 429, (Adv. Sh.), *12* N. W. (*2*) 696, sustaining the Circuit Court. It held that Section 201.18 Wisconsin Statutes requires that an unearned premium or reinsurance reserve be maintained in respect to *all* premiums, which includes

life membership fees, in respect to the entire business of a company. Motions for rehearing were denied March 14, 1944.

It is from these judgments of affirmance of the lower state court that appellant here appeals.

No Substantial Federal Question Is Presented.

1. *Section 201.18 (1) Wisconsin Statutes as construed and applied by the Supreme Court of Wisconsin is not violative of the due process provisions of the Fourteenth Amendment to the Constitution.*

The provisions of Section 201.18 (1) Wisconsin Statutes prescribe a requirement that must be met by all mutual insurance companies, domestic and foreign, in order to do business in Wisconsin. It prescribes a uniform minimum yardstick of over-all solvency that is used for comparative purposes in testing financial soundness and responsibility. This is shown by the language of the statute. It says that such reserve shall apply to "every insurance company" and in the last sentence specifically requires that "every" company "*shall* show" such reserve as a "liability" in the statement it is required to file annually by Section 201.50 Wisconsin Statutes.

The State of Wisconsin through legislative enactment of this statute has made this reserve a liability that every insurance company doing business in the state must show to be taken into account in viewing the financial situation of the company. This reserve is prescribed as one of the elements to be considered and used in passing upon and examining into whether an insurance company doing business in the state is in sound financial condition and has sufficient assets to meet all its liabilities. It may or not be a rather high requirement, but it is a protective measure enacted in the interests of the citizens of Wisconsin and aimed

at assuring that insurance companies with which they insure in the state are in such financial condition as to have adequate and sufficient assets to be able with facility to meet all their liabilities at all times.

The maintenance of such a reserve does have a definite benefit relationship to Wisconsin citizens. Appellant asserts that it does not because it creates a liability where none exists in respect to life membership fees in the other states where that plan of insurance is used by appellant. Its position is that in those states the life membership fees are not considered as a part of premium, are deemed earned at once when paid, and so no part thereof is returnable as unearned premium upon cancellation of policies. This assumes the statute provides for the maintenance of the reserve solely as a fund out of which return premiums are to be paid in the event of cancellations. On the contrary this statute does not so limit this reserve and requires the reserve in any event. It is a legislative recognition that during the unexpired terms of policies a company has a risk of liability on them which may accrue and provides a method for measuring such future potential liabilities so as to assure due allowance therefor for purposes of determining the financial condition both as to soundness and solvency. It merely sets up bookkeeping requirements. There is no segregation of assets or trust finding of them for a particular liability.

These reserve requirements are equally applicable to foreign and domestic companies. Section 201.32 (3) Wisconsin Statutes.

By Section 201.18 (1) Wisconsin Statutes the State of Wisconsin simply tells all insurance companies that if they wish to do business in the state they must meet this reserve requirement. This involves no attempt to legislate extraterritorally or in relation to something that is of no concern

of Wisconsin. It does not condemn the use of the company's life membership fee plan outside the state, but merely sets up a standard or yardstick that must be complied with. Such a requirement is not extra-territorial—it is territorial.

To deny the state of Wisconsin powers to so act would be to deny it the power to act as a sovereign within its own borders for the protection of its own people.

That the prescribing of such reserve requirements is well within state power is definitely established by *Hoopeston Canning Co.* v. *Cullen* (1943), 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777.

The statute here involved does not in any way provide in respect to rights of residents of Wisconsin to enter into contracts of insurance outside the state. Rather it prescribes qualifications and conditions that an insurance company must meet in order to do business in the state. The case of *Allgeyer* v. *Louisiana* (1897), 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832 cited by appellant is thus not in point.

Here there is no attempt even to exert state authority beyond its borders. The authority asserted rather is strictly confined to acts within its borders. The statute merely imposes conditions upon the right to do business within them and in no way prohibits or regulates what the company does in other states. Accordingly *New York Life Ins. Co.* v. *Head* (1914), 234 U. S. 149, 34 S. Ct. 879, 58 L. Ed. 1259, cited by appellant is beside the point here raised.

Similarly, the other cases cited by appellant to sustain its contention that Wisconsin has no power to prescribe this reserve as a condition to doing business in its borders are not in point.

2. The Provisions of Section 201.18 (1) Wisconsin Statutes as Applied Are Not Violative of the Full Faith and Credit Provision of Article IV, Section 1 of the Constitution of the United States.

The appellant does not point out in its jurisdictional statement in what way it contends the statute under consideration fails to give full faith and credit to public acts, records or judicial proceedings of some other state. Any attempt to state such contention immediately makes apparent its utter lack of merit.

Rather if appellant's contention were correct the result would be that instead of Wisconsin being able to exercise its own sovereign powers within its own borders by establishing standards of solvency that insurance companies must meet in order to do business in Wisconsin the other states would be permitted to act with an extra-territorial effect and fix the standards for Wisconsin.

3. The Provisions of Section 201.18 (1) Wisconsin Statutes as Applied do Not Impair the Obligations on Contracts Made by Appellant in Other States.

Here again appellant does not in any way support its assertion of violation of the provision against impairment of contract in Article I, Section 10 of the Constitution of the United States by specifying in what way the application of Section 201.18 (1) Wisconsin Statutes effects any impairment. Its assertion thereof is entirely without merit.

As previously pointed out this statute has no extra-territorial effect. In fact it in no way purports to modify or change the insurance policies entered into outside the State of Wisconsin. They remain the same in all respects. This statute merely prescribes what reserves shall be set up in reference thereto while the company does business in Wisconsin. Such reserve requirements being merely bookkeeping or accounting matters for use as over-all solvency con

siderations obviously make no change in the insurance contracts themselves. As said in *Osborn* v. *Ozlin* (1939), 310 U. S. 53, 60 S. Ct. 758, 84 L. ed. 1074, and approved in *Hoopeston Canning Co.* v. *Cullen* (1943), 318 U. S. 313, 63 S. Ct. 602, 87 L. ed. 777 that state action of this kind aimed at protection of assureds resident therein may have incidental repercussions beyond the jurisdiction of the state is of no constitutional import.

Conclusion.

To deny the State of Wisconsin power to prescribe in this manner would be the equivalent of saying that it cannot protect its own people within its borders, but must permit other states and the insurance companies to establish standards of solvency which Wisconsin must accept, whether it will or not. Such is not the law. The foregoing clearly shows that the decision of the Supreme Court of Wisconsin that Section 201.18 (1) Wisconsin Statutes as interpreted and applied by it does not violate the Constitution of the United States as asserted by appellant is so plainly right as not to require argument. Therefore no substantial federal question is presented. Not only should the appeals be dismissed but upon the motion of the appeal to dismiss or affirm, which accompanies this statement, the decision of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

JOHN E. MARTIN,
Attorney General of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Appellee.

P. O. Address:
State Capitol,
Madison, Wisconsin.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

(Case No. 3.)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Respondent.

(Case No. 4.)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION TO DISMISS APPEAL OR AFFIRM.

Comes now Morvin Duel, Commissioner of Insurance of Wisconsin, Appellee herein, by John E. Martin, Attorney General of the State of Wisconsin and Harold H. Persons, Assistant Attorney General of the State of Wisconsin, its

counsel, and moves this Court to dismiss, with costs, the appeal taken herein to this Court by the State Farm Mutual Automobile Insurance Company, an Illinois corporation, from the judgments of the Supreme Court of the State of Wisconsin, dated January 18, 1944, upon the following grounds:

1. No substantial federal question is presented.

2. The decision of the Supreme Court of Wisconsin was so plainly right as not to require reargument.

In the alternative appellee moves this Court to affirm on the ground that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

Dated this 18th day of May, 1944.

JOHN E. MARTIN,
Attorney General of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Appellee.

In The

Supreme Court of the United States

October Term, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation,

Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF APPELLEE

JOHN E. MARTIN,
Attorney General of Wisconsin,

HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,

Counsel for Appellee.

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In The

Supreme Court of the United States

October Term, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation,
Appellant,

vs.

MORVIN DUEL, Commissioner of Insurance of the State of Wisconsin,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF APPELLEE

NATURE OF THE CASE

This appeal brings up for review the decision of the Supreme Court of Wisconsin that the Appellant, an Illinois insurance corporation, is not entitled to do an insurance business in the State of Wisconsin unless it satisfies the requirements of the Wisconsin Statutes, applicable to both domestic and foreign insurance companies, that the reserve specified by Section 201.18 Wisconsin Statutes be shown and included as a liability in the annual statement of its affairs, which statement Section 201.50 Wisconsin Statutes requires every insurance company to file each year with

the Appellee Commissioner of Insurance. Said decision dated January 18, 1944 is reported *State Farm Mutual Automobile Insurance Co. v. Duel*, (1944) 244 Wis. 429, 12 N. W. (2) 696. (R. 135-139) Motion for rehearing was denied March 14, 1944. (R. 140) Certain phases of the decision are dependent upon and require reference to the decision in a prior case reported *Duel v. State Farm Mutual Automobile Insurance Co.*, (1942) 240 Wis. 161, 1 N. W. (2) 887, 2 N. W. (2) 871.

The appeal is from two judgments of the Supreme Court of Wisconsin entered, pursuant to said decision, in two separate appeals to that Court which were there heard, considered and decided together. Said judgments affirmed separate judgments of the Circuit Court for Dane County, State of Wisconsin, dismissing two actions commenced therein by the Appellant to enjoin the Appellee Commissioner of Insurance of the State of Wisconsin from interfering with its doing an insurance business in the State of Wisconsin for the respective periods of May 1, 1942 to April 30, 1943 and May 1, 1943 to April 30, 1944, and to compel Appellee to approve of its doing business therein during said periods by issuing licenses therefor which Appellee had refused to do. The basis of his refusal was that the Appellant failed to comply with the provisions of Section 201.18 of the Wisconsin Statutes requiring that a reserve computed as therein specified be included and shown as a liability in the annual statements it is required to file by Section 201.50 of the Wisconsin Statutes. The Supreme Court of Wisconsin in its decision sustained the position of the Appellee that the Appellant company did not comply with said statutes and is not entitled to do business in the state unless it does so.

STATUTES INVOLVED

The provisions of Section 201.18 of the Wisconsin Statutes directly involved are:

> "201.18 Reserves, basis for. (1) The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by section 201.50.
>
> "(2) * * *."

Of importance as related to the question of the validity of the above provisions are the following provisions of the Wisconsin Statutes:

> "201.32 Foreign companies; admission. (1) No foreign insurance company shall directly or indirectly transact any insurance business in this state except upon compliance with the requirements of this section.
>
> "(2) * * *
>
> "(3) A mutual company shall satisfy the requirements as to solvency and the limitations as to expenses exacted of like domestic companies.
>
> "(4) The foreign company shall file a declaration that it desires to transact insurance in this state, and that it will accept a license therefor to terminate in case it shall violate or fail to comply with any provision

of law, or in case its capital shall be impaired to the extent of twenty per cent, and shall not be made good within such time as the commissioner shall require, if such commissioner shall declare its license revoked therefor.

"(5) * * *

"(6) * * *."

"201.34 License; visitation; foreign companies. (1) The commissioner shall upon being satisfied by investigation that any insurance company applying for license or relicense has fully complied with all provisions of law, and that its methods and practices in the conduct of its business and the character and value of its assets are such as to safeguard the interests of its policyholders and the people of the state, issue to such company a license to transact business in this state, and shall renew the same from year to year so long as such company shall meet all requirements of law; and shall give to every agent of such company a certificate that such company has complied with all the provisions of law and is authorized to transact business in this state, which license to the company and certificate to agents shall continue in force until the first day of May next after the effective date thereof, unless sooner revoked.

"(2) The commissioner shall have the same supervision and make the same examination of the business and affairs of every licensed foreign insurance corporation as of domestic corporations doing the same kind of business, and of its assets, books, accounts and general condition. Every such foreign corporation and its agents and officers shall be required to make the same statements and answer the same inquiries and be subject to the same examinations, and, in case of default therein, to the same penalties and liabilities

as domestic corporations doing the same kind of business, and the agents or officers thereof may be liable to.

"(3) * * *

"(4) * * *."

"201.50 Reports to commissioner, forms, contents, penalties. (1) Every insurance company shall annually by March first file with the commissioner a sworn statement concerning its affairs for the preceding calendar year, upon such forms and including such information as shall be prescribed by him. The statement of any company organized under the laws of any foreign country shall set forth its business and affairs in the United States, verified by its resident manager in the United States. The commissioner shall prepare forms of annual statement for the various kinds and classes of insurance companies and societies, suitable for eliciting a true and complete exhibit of the financial condition, character and methods of each company or society, and he shall include in such forms, requisition for information upon all important elements of business transacted in each kind and class of insurance, including gain and loss, and any matter, condition or requirement imposed by law and tending to a strict accountability of the management. The commissioner shall furnish annual statement blanks to the insurance companies and societies, and shall cause the information contained in the annual statements to be arranged in convenient form and published in his annual report.

"(2) No company or society shall be relicensed until such annual statement has been so filed and all other provisions of the law complied with; provided, the commissioner may extend the time for filing such annual statement to March thirty-first. * * *"

"206.55 Insurers to comply with law. No insurance company shall do any insurance business or make any guaranty, contract or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder, or the like, in this state or with any resident of this state except according to the conditions and restrictions of the statutes of this state."

QUESTION PRESENTED

Whether the provisions of the Wisconsin Statutes requiring that every insurance company, domestic and foreign, in order to be entitled to transact insurance business in Wisconsin, must show and include the reserve specified in Section 201.18 (1) Wisconsin Statutes as a liability in the annual statement of its affairs, which Section 201.50 Wisconsin Statutes requires every company to file each year with the Commissioner of Insurance of Wisconsin, are violative of any of the following provisions of the United States Constitution:

(1) Commerce Clause of Article I, Section 8.

(2) Due Process Clause of the Fourteenth Amendment.

(3) Full Faith and Credit provision of Article IV, Section I.

STATEMENT OF MATERIAL FACTS

There is no dispute as to the facts which are material to the questions presented on this appeal.

The Appellant, State Farm Mutual Automobile Insurance Company, is a corporation organized in 1922 under the Laws of the State of Illinois and having its principal or home office at Bloomington, Illinois. For many years it has used a life membership fee plan of writing automobile insurance and now uses such plan, in most of the States in which it operates. The nature of this plan is fully considered by the Supreme Court of Wisconsin in its decision in *Duel v. State Farm Mutual Automobile Insurance Co.*, (1942) 240 Wis. 161, 1 N. W. (2) 887, 2 N. W. (2) 871.

Under this life membership fee plan, each policyholder upon becoming such must pay a separate membership fee for each general class or kind of automobile insurance then or later purchased by him. This fee is not the same for all but varies in amount with the type of coverage and with the territory or locality in which the policyholder resides or does business. Once a membership fee is paid for any given coverage it is never required to be paid again, although he may change the automobile to which the policy applies. He may also drop the policy and later reinstate it. The policyholder also pays an additional sum of money which the Appellant denominates as premium. The policies run for an initial period of six months and are then extended for successive six month periods by payment of a similar sum direct to the Appellant for each such extension or renewal, the amount thereof being determined by the Appellant upon the basis of the cost of the coverage during the preceding period. The Appellant considers these life mem-

bership fees paid as wholly separate and distinct from the sums payable each successive six months, which latter it denominates as the premium. The policy contains a provision that such life membership fees are not returnable but entitle the policyholder for life to insure one automobile for the coverages for which life membership fees are paid so long as the company writes the same and the insured remains a desirable risk. Should a policyholder desire additional coverage of a type not included in the policy and for which no life membership fee has been paid, it would be necessary for him to pay another life membership fee for such additional coverage as well as the six months' charge to be collected therefor which the Appellant denominates as the premium. As noted in *Duel v. State Farm Mutual Automobile Insurance Co.*, (1942) 240 Wis. 161, 176, 1 N. W. (2) 887, 2 N. W. (2) 871, for many of Appellant's purposes and reports it considers these life membership fees as premiums.

Continually over the years the Appellant has endeavored to be permitted to do an automobile insurance business in the State of Wisconsin using this life membership fee plan. Over the years the various Commissioners of Insurance, with the single exception of 1939, consistently took and adhered to the position that its methods were such that it did not and could not comply with the provisions of the Wisconsin Statutes regulating insurance and refused to issue it a license as evidencing compliance with such state law. In 1939, however, Commissioner Mortensen took a contrary position and on July 13, 1939 issued it a license as a foreign insurance company to do all forms of automobile insurance business in the state upon this life membership fee plan for the period May 1, 1939 to April 30, 1940.

This was the first and only time the Appellant has done business in Wisconsin as the holder of a license so to do.

In the course of things after his appointment on September 27, 1939, the Appellee, Morvin Duel, as Commissioner of Insurance addressed himself to the legality of the Appellant's doing business in the State and of such license. Upon application by Appellant for renewal for the period May 1, 1940 to April 30, 1941, Appellee refused the same because *inter alia* this life membership fee plan did not comply with the requirements of the Wisconsin Statutes. His position in this regard was confirmed by the decision of the Supreme Court of Wisconsin in *Duel v. State Farm Mutual Automobile Insurance Co.*, (March 13, 1942) 240 Wis. 161, 1 N. W. (2) 887, 2 N. W. (2) 871. It was there held that "premium" as used in the Wisconsin Statutes, and particularly Section 201.18, includes "all sums which must be paid before insurance protection is granted and which are exacted to defray the cost of insurance protection," and therefore includes life membership fees. Perforce of various procedural steps in presenting that case to the Supreme Court of Wisconsin, the Appellant continued during the litigation to do business in Wisconsin upon said life membership fee plan under and pursuant to temporary injunctions.

Following this decision the Appellant abandoned the use of the life membership fee plan in Wisconsin but continued to use it elsewhere. It then applied for a license for the period May 1, 1942 to April 30, 1943 to use the level premium plan in Wisconsin. Because *inter alia* the reserve specified by Section 201.18 Wisconsin Statutes shown and included as a liability in the statement of affairs filed by the Appellant did not include any reserve in respect to

life membership fees the Appellee refused such license. It was his position that Section 201.18 Wisconsin Statutes, as interpreted in the decision in *Duel v. State Farm Mutual Automobile Insurance Co.*, (1942) 240 Wis. 161, 1 N. W. (2) 887, 2 N. W. (2) 871, requires that such reserve be computed and shown in respect to *all* premiums which includes life membership fees. It is not disputed that the reserve set out in Appellant's statement does not do this.

Thereupon the Appellant State Farm Mutual Automobile Insurance Co. commenced action in the Circuit Court for Dane County, Wisconsin, to enjoin the Appellee from interfering with its doing business in the State and to compel him to issue it a license for the period May 1, 1942 to April 30, 1943, asserting *inter alia* that applied as so construed sec. 201.18 offends the due process and the full faith and credit provisions of the United States Constitution. Appellee answered and following state practice moved for summary judgment dismissing the action on the merits.

Before this motion was decided the period May 1, 1943 to April 30, 1944 came around and there being no factual changes as respects the matters involved, the Appellee similarly denied the Appellant's application for a license for that period and refused to issue it for the same reasons. Appellant then commenced a like action in the same court but covering the new period. Answer was made thereto and by stipulation the motion for summary judgment was made applicable to both the pending cases.

On July 3, 1943 the Appellee's motion for summary judgments was granted and judgments were entered by the trial court in both cases dismissing them on the merits. Appellant State Farm Mutual Automobile Insurance Company then took separate appeals from these judgments to

the Supreme Court of Wisconsin. The cases were briefed, heard and decided together. In its decision therein January 18, 1944 reported *State Farm Mutual Automobile Insurance Co. v. Duel*, (1944) 244 Wis. 429, 12 N. W. (2) 696, the Supreme Court of Wisconsin sustained the position of the Appellee and held that sec. 201.18 Wisconsin Statutes requires that the reserve therein specified be computed and shown in respect to *all* premiums, which includes life membership fees, in respect to the entire business of a company. Motions for rehearing were denied March 14, 1944. It is from the judgments of affirmance of the lower state court entered pursuant to said decision that Appellant here appeals.

ARGUMENT

I. THE PURPOSE OF THE UNEARNED PREMIUM RESERVE REQUIRED BY SECTION 201.18 (1) WISCONSIN STATUTES IS TO MEASURE FUTURE CONTINGENT LIABILITY UPON UNEXPIRED RISKS AS ONE OF THE ELEMENTS OR FACTORS TO BE TAKEN INTO ACCOUNT IN DETERMINING FINANCIAL CONDITION AND STABILITY.

The Appellant's position on this appeal in the main is predicated upon the same erroneous assertion that was urged by it before the Supreme Court of Wisconsin. It is that the reserve as required by Section 201.18 (1) Wisconsin Statutes is solely to show liability for return to policyholders of unearned premiums in the event of cancellation before expiration. Appellant claims that in those states where it uses the life membership fee plan no part of life membership fees is returnable because the policies contain express provisions to that effect and such fees are not there regarded as premium. It then urges that as no obligation exists to return these life membership fees or any part thereof, the requirement of such reserve computed and shown for life membership fees as well as for what it denominates as premium in those states is unreasonable and invalid as requiring a reserve for a liability that does not exist.

As stated above this same contention was made by it in these same cases before the Supreme Court of Wisconsin and rejected by that court. It thus stands that the state court has construed this statute as not having such a restrictive purpose or operation. Otherwise that court would have accepted Appellant's argument and declared the statute

unreasonable and inoperative as applied in these cases to life membership fees.

The purpose of this reserve is to measure the entire future contingent liability on unexpired risks as one of the elements or factors to be taken into account in passing upon and determining financial condition and stability in the future as well as the present. The language of the statute does not say that this reserve is one set up to show possible liability in the future for return or refund of unearned premium in the event of cancellation before expiration. It merely denominates the reserve as "unearned premium or reinsurance reserve." The denomination of the reserve as "unearned premium reserve" does not in and of itself limit the liability it reflects to just that of returning or refunding some part of premium in the event of cancellation. The narrowest meaning or effect that could be given such denomination of it as "unearned premium reserve" is that the reserve to be shown is the amount of premium which has not been earned because the policy has a portion of its term still to run and the liability thereby reflected is the proportionate unexpired part of the insurance protection for which the whole premium was paid and includes whatever contingent liability attends upon carrying the policy to its expiration.

It is true that refund of unearned premium upon cancellation may be one of the liabilities in the alternative for which the reserve is required, but it is not the only one. There is the liability attendant upon the company's carrying the risk of anticipated losses in the future to the end of the term of the policy, and also the contingent liability of the amount which it might have to pay to reinsure the risk for the unexpired term in another company. The de-

nominating of this reserve as both "unearned premium" reserve and "reinsurance" reserve arises probably out of the fact that it is impossible to completely divorce the amount required to pay premiums for reinsurance by another company from the amount necessary for the company itself to carry the risk of future losses during the remainder of the policy term. Another company would not reinsure without taking into account the possibility of future losses and the cost of carrying the policy to its expiration in determining its charge for reinsurance.

Riegel & Loman, Insurance Principles and Practice, Revised Edition 1942, at page 392, in discussing a reserve of the kind says:

> "* * * From the standpoint of the insured the reserve may be regarded as a fund which enables the company to return the unearned portion of the premium in case of cancellation, and provides for the reinsurance of the risks with other companies. It is very important to the insured, for example, to know that the insurance company has laid aside a sufficient sum to take care of all possible losses. If this were not done by maintaining a reserve of the unearned premium the company would be gambling on the probabilities of loss and endangering its future solvency. * * * It is not to be inferred from this that another company will assume these risks under all circumstances for exactly the amount of the reinsurance reserve, for this depends on the character of the risks that are being carried. If the underwriting methods of the retiring company have been conservative it may be that another company will be glad to assume the business for an amount forty per cent less than the unearned premium reserve. On the other hand, if a reckless or unfortunate company has accumulated undesirable risks on its books it may

be that the reserve held would be considered insufficient. In fact, when a company goes out of business, it is most frequently due to unsuccessful methods of underwriting, and the accompaniment is usually an inadequate reserve. In these cases the transfer of the risks often requires a sum exceeding the reserve.

"Thus the reserve is necessary as (1) a premium as yet unearned, (2) a necessary element in estimating solvency, (3) a fund providing for return of premiums on policies canceled, (4) a fund providing premiums for reinsurance, if necessary, and (5) a fund for the payment of future losses. The manner in which the reserve is calculated determines its efficacy for these purposes."

This statute is a recognition by the Legislature of Wisconsin that during unexpired terms of policies a company has a risk liability which may accrue thereon and provides a method for measuring such future liability to be taken into account for purposes of determining the company's financial condition and stability.

This reserve is merely a bookkeeping entry. There is no segregation or trust funding of assets for this reserve liability. It is purely an accounting matter that is taken into consideration in passing upon solvency and soundness of the insurance company. Such a reserve for unearned premiums is not set up separately for each state in which a company does business because solvency and soundness are not determinable on a state basis but in respect to the entire assets, liabilities and affairs of the company on an over-all basis. Necessarily it is determined upon a unitary basis.

The history of the provisions of Section 201.18 (1) Wisconsin Statutes shows that since 1911 the State of Wisconsin by statute has required that reserves of this character be computed and taken into account. By Chapter 235, Laws of Wisconsin of 1911, there was enacted Section 1899, containing Subsections (a) and (b), the provisions of which, with some subsequent phraseology changes not affecting the substance, for all practical purposes are the same as the present Subsection (2) of Section 201.18 Wisconsin Statutes now reading:

> "(2) Where no other provision is made therefor by law, the reserves of any insurance company shall be calculated upon such basis, method and plan as shall fully provide for all liabilities, and any basis, method and plan fixed by the order of the commissioner shall be prima facie just, reasonable and proper."

By Chapter 291, Section 3, Laws of 1913 said Section 1899 was renumbered to be Section 201.18. Then Chapter 246 Laws of 1929 renumbered Subsections (1) and (2) of Section 201.18 to be Subsections (2) and (3) thereof, and added a new Subsection (1), which, with subsequent phraseology changes not affecting the substance, is the present Section 201.18 (1) here involved. These phraseology changes made by Chapter 487, Laws of 1933 merely condensed the provisions of Subsection (1) and at the same time combined and condensed the previous Subsections (2) and (3) into the present Subsection (2) above quoted.

Thus it is that for at least the last 30 years the State of Wisconsin through its statutory enactments has dealt with the matter of reserves of insurance companies and since 1929 has had in its statutes the specific requirements

of Section 201.18 (1) presently here under attack. These statutory provisions are general in that they apply to all insurance companies, domestic and foreign, and rest upon concern with having sound and stable companies with which the citizens of Wisconsin may deal in insuring their property. As previously noted the administrative officials of Wisconsin, with the single exception of the 1939 transaction with Appellant, have consistently interpreted and applied this Section 201.18 (1) as requiring a showing of the reserve upon all premiums, including therein the entire payment made by the insured to obtain the insurance, and when presented to the Supreme Court of Wisconsin in the prior case of *Duel v. State Farm Mutual Automobile Insurance Co.*, (1942) 240 Wis. 161, 1 N. W. (2) 887, 2 N. W. (2) 871, it in effect held such interpretation correct and that the 1939 departure therefrom was erroneous.

Appellant at page 15 of its brief quotes from this decision and asserts that by virtue thereof the Supreme Court of Wisconsin held that Section 201.18 was not designed to secure over-all solvency. What the Court there said was in answer to the same argument which Appellant again makes here that because it shows a voluntary contingent reserve of $4,000,000 and a surplus of $8,994,982.39 in its statement, this reserve of Section 201.18 (1) is wholly unnecessary and without valid purpose because it is not claimed that Appellant is insolvent and the existence of such surplus and contingent reserve demonstrates that it is solvent. True it is that the State has not claimed the Appellant is insolvent: On the other hand until the reserve of Section 201.18 (1) is shown as a liability it cannot be determined that it is solvent and sound. Whether or not it has such asserted surplus, or any surplus at all, is de-

pendent upon the amount of this reserve. No surplus exists until this reserve has been calculated and given effect as a liability. When this reserve is calculated and given effect as a liability it may be that it would completely wipe out the asserted surplus and the contingent reserve. This is the very reason that the statutes requires such reserve to be calculated and shown as a liability. With this in mind the ridiculousness of saying that this reserve has no pertinancy to over-all solvency is obvious.

II. SECTION 201.18 (1) WISCONSIN STATUTES, AS CONSTRUED AND APPLIED, IS NOT VIOLATIVE OF THE COMMERCE PROVISION OF ARTICLE I, SECTION 8 OF THE UNITED STATES CONSTITUTION.

(1) *Appellant makes no objection to consideration of this issue, although not raised below.*

This point is raised in these cases for the first time in this Court. However, notwithstanding that the well established rule is that the Court will not consider or pass upon questions not raised in the state court, the Appellee here does not object to this point being injected into the case.

In the first place, assuming for the purposes of this argument that the insurance transactions of the Appellant in Wisconsin are sufficiently shown in the record to be interstate commerce, if state regulation of the type here involved is a valid exercise of state power it will go a long way towards quieting much of the uncertainty existing in the minds of some to have it so stated authoritatively. On the other hand, were it not valid then likewise it would be equally important if it were so established.

In the next place, were Appellee to object and the case considered without this point or the case remanded to the state court to pass thereon, the only result would be a postponement of a decision upon the issue to some future date. Appellant company has been litigating with the State of Wisconsin over doing business therein since early in 1940 and perforce of the annual licensing feature of the statutory regulatory scheme a new case has been started in respect to each of the license years. Two cases (designated as Nos. I and II for identification) covering the license years May 1, 1940 to April 30, 1941 and May 1, 1941 to April 30, 1942, were ultimately decided adversely to the Appellant by *Duel v. State Farm Mutual Automobile Insurance Co.*, (1942) 240 Wis. 161, 1 N. W. (2) 887, 2 N. W. (2) 871. But, perforce of procedural considerations, the temporary injunctions therein, under which it did business during those license periods, were continued until it took another tack resulting in two more cases (designated as Nos. III and IV for identification) involving the subsequent license years May 1, 1942 to April 30, 1943 and May 1, 1943 to April 30, 1944, which are the cases involved in this appeal here. Temporary injunctions in these cases similarly gave it the opportunity to continue to do business in the state without complying with the reserve requirements of Section 201.18. Here again the decision by the Supreme Court of Wisconsin was against the Appellant, but under stay orders it continued to do business in Wisconsin and is now doing so by virtue of a temporary injunction in still another case, (No. V) which it has commenced in respect to the license year May 1, 1944 to April 30, 1945.

Thus, although the State's officials have prevailed throughout, the victories have been Pyrrhic for the Appel-

lant has done business in Wisconsin since 1939 and is now doing business therein, although it has never complied with Wisconsin statutory regulations and presently fails or refuses to comply therewith. From the standpoint of effective administration of the statutes of Wisconsin it is desirable to have the issue now raised in respect to interstate commerce authoritatively determined as early as possible. If not ruled upon at this time the question will come back some months hence by a subsequent appeal in this same matter, or else the issue will ultimately come here upon appeal in case No. V, now lying dormant in the lower state court pending this appeal.

Appellee therefore makes no objection to the Court considering the interstate commerce feature as raised by the Appellant, and if consent thereto is in order it is hereby given. However, such non-objection or consent is limited to the narrow question presented which is whether exaction by the State of Wisconsin of the reserve requirements of Section 201.18 (1) Wisconsin Statutes as a condition to doing an insurance business in the state when applied to a foreign corporation is invalid as imposing an unreasonable or undue burden upon interstate commerce.

(2) *The requirements of Section 201.18 (1) are within the realm of proper state regulation.*

The Appellant does not assert that because it claims it is engaged in interstate commerce when it does business in the State of Wisconsin the state is wholly precluded from regulating the conduct of such business within its borders. Its contention is very narrow and is that the reserve requirements of Section 201.18 (1) as applied to the

Appellant do not effectuate a legitimate state interest and therefore unduly burden and obstruct interstate commerce. There is not presented any broad claim that no state regulation of interstate commerce is valid but on the contrary there is acceptance by all parties of the pronouncements of this Court in recent cases that in the absence of congressional action state regulation of interstate commerce is valid where it is grounded upon matters of local concern and does not unduly burden or obstruct interstate commerce. *U. S. v. South-Eastern Underwriters Assn.*, (1944) 322 U. S. 533, 64 S. Ct. 1162, 88 L. ed. (adv.) 1023; *Parker v. Brown*, (1942) 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315; *Milk Control Board v. Eisenberg Farm Products*, (1938) 306 U. S. 346, 59 S. Ct. 528, 83 L. ed. 752; *California v. Thompson*, (1940) 313 U. S. 109, 61 S. Ct. 930, 85 L. ed. 1219; *Union Brokerage Co. v. Jensen*, (1944) 322 U. S. 202, 64 S. Ct. 967, 88 L. ed. 887.

Nor is any position taken in this case that there is any question as to the validity of the requirement that a foreign insurance company obtain a license from the State of Wisconsin before it may transact its insurance business in that state. The probable reason that no such a position is taken is that it would be without merit. A state regulation that is otherwise valid as a proper exercise of the police power is not rendered invalid because the method by which it is enforced is a licensing requirement. *Milk Control Board v. Eisenberg Farm Products*, (1938) 306 U. S. 346, 59 S. Ct. 528, 83 L. ed. 752; *California v. Thompson*, (1940) 313 U. S. 109, 61 S. Ct. 930, 85 L. ed. 1219; *Union Brokerage Co. v. Jensen*, (1944) 322 U. S. 202, 64 S. Ct. 967, 88 L. ed. 887; *Caskey Baking Co. v. Virginia*, (1941) 313 U. S. 117, 61 S. Ct. 881, 85 L. ed. 1223.

Accordingly we do not have up for consideration in this case anything other than the narrow question of the validity of Section 201.18 (1) as a state regulation. There is not brought into question any other features or provisions of the Wisconsin statutes relating to insurance companies and any broad consideration of them is entirely outside of the issues of this case.

It is not challenged by Appellant that state requirement of reserves in the interest of financial soundness and stability of the insurance companies that do business in a state is a subject of legitimate local concern and may be imposed on foreign insurance companies. It seems doubtful that anyone would so contend, for nothing could be more properly the subject of local concern and interest than the maintenance of financially sound and stable insurance companies in a state so as to protect the economic welfare of the persons who might take insurance with them. As stated by the well known authority, Professor Huebner, in *Property Insurance*, 1938 edition, at page 251:

> "From the foregoing it is evident that the maintenance by every company of a fund equal to the unearned premiums on all its policies in force should be a necessary requirement for its financial solvency. It is only natural, therefore, that the several states have enacted laws requiring the companies to maintain such a reserve, and making it the duty of the insurance commissioner to determine annually their financial condition. These laws are of the greatest importance, and upon their strict observance depends, very largely, the security of policyholders. * * *"

The field is one in which state police power is properly exercisable because the business of insurance and activities

in the conduct thereof are affected with a public interest. *German Alliance Insurance Co. v. Lewis*, (1914) 233 U. S. 389, 34 S. Ct. 612, 58 L. ed. 1011, *National Union Fire Ins. Co. v. Wanberg*, (1922) 260 U. S. 71, 73, 43 S. Ct. 32, 67 L. ed. 136, 138.

(3) *Section 201.18 (1) Wisconsin Statutes as construed and applied does not impose an unreasonable burden upon interstate activities of the Appellant.*

Upon this point it is pertinent that, as previously stated, observance of and compliance with the requirements of Section 201.18 (1) does not require that the Appellant set aside, trust fund, or segregate any assets or property, within the State of Wisconsin or elsewhere. Nor does this statute attempt to regulate or restrict the Appellant in doing business outside of Wisconsin any way whatsoever. This statute does not purport to and does not in any way change or affect the terms or liabilities on insurance policies outside of the state. All that it does is to require as a condition of doing business in the state a reserve be shown as a liability in the statement the company must file with the Commissioner of Insurance, and that such reserve, according to the interpretation given by the Supreme Court of Wisconsin to the word "premium" as used therein, must be computed in respect to all unexpired risks and upon the total amount paid by policyholders as consideration for obtaining of such insurance.

The argument of Appellant is that because life membership fees collected in other states are not there regarded as premium the State of Wisconsin may not treat them as premium for the purpose of computation of reserves in test-

ing financial soundness and stability of the Appellant. This would deny to the State of Wisconsin the right to fully exercise its police power in respect to solvency which is an admitted and recognized proper field of state regulation. To deny the state such power would be to deny it the power to act as a sovereign within its borders in a field that is proper for it to exercise such power. It would be equivalent to saying that Wisconsin cannot protect its own people but must permit other states and insurance companies to establish and fix its standards of soundness and solvency, which it must accept whether it wants to or not.

In this connection Appellant states that requiring this reserve does not benefit Wisconsin policyholders. Obviously it is wrong in this assertion for quite clearly the requirement of this reserve does not operate to set up any separate fund or particular assets to which resort may be had for preferential payment of claims either by Wisconsin policyholders or by policyholders generally on the policies to which the reserve relates. The claims of Wisconsin policyholders remain on an equal standing with those of all policyholders everywhere and resort for payment of their claims is to the general assets the same as policyholders elsewhere must do. In the event of liquidation, which would be administered in the main at least in the domiciliary state of an out-of-state company, Wisconsin policyholders would have to assert their claims along with the claims of all policyholders against the assets generally. The same situation exists in reference to Wisconsin citizens and residents asserting damage claims against Wisconsin policyholders and the company as carrying the ultimate liability thereof. Collectibility is thus directly related to and dependent upon the company having assets generally that will be sufficient

to discharge all of its liabilities. The solvency of the company as tested in part by such a reserve thus bears a direct relationship to Wisconsin policyholders and the requirement thereof operates towards assuring adequate general assets to which they will have to resort in the event of liquidation or assertion of damage claims against the company on their policies. It has a bearing upon the company maintaining sufficient assets generally so as to carry out the policies to expiration and furnishing full protection to the policyholders from the assertion of damage claims against them by assuring payment thereof by the company. In addition it similarly has a bearing upon assuring that citizens and residents of Wisconsin who have damage claims against policyholders will be protected by the company having adequate assets to pay the same, and particularly if the policyholders themselves should not have sufficient wealth to make the claims collectible.

As the case stands here this statute of Wisconsin is to be taken as though in express terms it defined "premium" exactly and precisely as the Supreme Court of Wisconsin did in its opinion in the prior case of *State Farm Mutual Automobile Insurance Co. v. Duel*, (1944) 244 Wis. 429, 12 N. W. (2) 696. It is said in *State Farm Mutual Automobile Insurance Co. v. Duel*, (1942) 240 Wis. 161, 1 N. W. (2) 887, at page 175:

> "* * * Thus, it is not only the statutory purpose to include in the term 'premium' all sums which must be paid before insurance protection is granted and which are exacted to defray the cost of insurance protection, but it is contemplated that in return for this premium insurance protection be given which is susceptible of periodic measurement when the insurance is for a definite term. It cannot have been the statutory intent to

permit insurance companies to allocate a portion of the expenses of doing business for some sort of privilege and to designate the rest of the cost of insurance a premium. *To do this would put it within the power of insurers to set their own reserve requirements by redefining 'premium.'* The situation is not helped by so arranging the contract that the fee carries no insurance or other liability. This destroys the statutory scheme for reserves quite as effectively as any other plan for splitting the premium." (Emphasis supplied)

The Appellant stands in relation to this state reserve regulation the same as the employer in *Walling v. Helmerich & Payne*, (Nov. 6, 1944) — U. S. —, 65 S. Ct. 11, 89 L. ed. (adv.) 1, where this Court held that a "split-pay" plan using an arbitrary allocation was an ingenious method to circumvent the provisions of the Fair Labor Standards Act and if allowed it would negative the very purpose thereof. Here Appellant contends that its use elsewhere of a plan, wherein the consideration paid by a policyholder for insurance protection is split up by arbitrary allocation so that a part is denominated a life membership fee and the remainder premium, must be permitted to circumvent the reserve requirements of the Wisconsin statute and negative the very purpose thereof.

If the subject of a state regulation is within the field of state power, as surely is the case here, for the statute is grounded upon protecting the citizens and residents of the state by endeavoring to have sound and stable insurance companies with which they take insurance, it must be sustained unless it can be said that the method adopted bears no reasonable possibility of achieving the object and purpose sought to be accomplished. Such is not the case here

for as shown above it does have a very definite relationship to affording protection in respect to financial soundness and stability which is the object of the regulation.

The method used by this statute is a rule of thumb that is in general use throughout the country. As stated by Professor Huebner in *Property Insurance* at page 252:

> "In its strictest sense, we have seen that the reserve of a fire insurance company should consist of the unearned portion of all premiums collected. But when it is remembered that policies vary in their term all the way from a short period to a period of five years, and even longer, and that more policies are written at one time of the year than at another, it is apparent that it would be a difficult task to examine individually the thousands of policies of a large company with a view to determining the unearned portion of the premium for each. For all practical purposes a short cut rule may be adopted for the approximate ascertainment of this unearned fund. The law of Pennsylvania, already quoted, and generally applied throughout the United States, furnishes such a rule. It provides that the insurance commissioner shall calculate the reserve for unexpired fire risks by 'charging fifty per centum of the premiums written in their policies upon all unexpired risks that have one year or less than one year to run, and a pro rata of all premiums on risks having more than one year to run.'
>
> "This rule is only approximately correct in its application to actual conditions, since it is based on the assumption that the volume of the company's business is uniform throughout the year, i.e., that as many policies of a given term are written on the first day of the year as on the last, and that as many are written on June 30 as on July 1. If this assumption is granted, it follows that the average life of all policies written

in a given year is six months; and that consequently six months of the premium is earned, while the balance is still unearned. If all the policies written by a company in a given year are one-year policies, our rule provides, since all these policies are assumed to have been in force six months, that the company can consider one-half of the total premium income from these policies as earned, and that the other half still remains to be earned. This unearned half of the total premiums, however, which constituted the reserve for that year on one-year policies, will be earned during the first half of the following year.

"If policies are written for longer terms, such as two, three, four, and five years, the same principle is applied. * * *"

Aside from the above, great practical difficulties would exist if state officials were required to determine the amount of the consideration paid for insurance that is regarded as premium in the state where written and use that as the premium upon which to compute the reserve. A determination would have to be made for each company separately and in respect to each and every kind or type of policy used. Also separate investigation and determination would have to be made for each state. And in the absence of express provision by statute or a decision of the Court of last resort in each state it could never be certain that the determination arrived at would be correct. It would require interpretation of the laws of the other states which might not be correct. Elimination not only of work involved but of the uncertainty attendant thereto is effected by the method used in Section 201.18 (1). Consideration of dealing with the intricacies involved in a practical and workable manner in the interest of administrative con-

venience alone furnishes sufficient ground for the legislature to adopt computation of this reserve upon the entire consideration paid by policyholders for their insurance as its standard to be used to reflect liability to be taken into account in considering the financial soundness and stability of insurance companies doing business within the state. *Hans Rees' Sons v. North Carolina*, (1931) 283 U. S. 123, 51 S. Ct. 385, 75 L. ed. 879. As said by Justice Holmes in *Bain Peanut Co. v. Peirson*, (1931) 282 U. S. 499, 501, 75 L. ed. 482, 491, 51 S. Ct. 228, "* * * the machinery of government would not work if it were not allowed a little play in its joints. * * *"

As previously stated the statutory regulation here involved is non-discriminatory. It falls and is imposed alike upon all insurance companies doing business in the state, domestic and foreign, for by its terms this reserve is required to be shown as a liability by "every insurance company." While compliance therewith is necessary for a foreign insurance company to obtain an annual license and a similar license is not required of domestic companies, the annual license requirement is merely the implementation of the statute as applicable to foreign companies and constitutes the means of enforcement thereof against them. Domestic companies are under direct supervision and control of the Commissioner of Insurance and this statutory requirement has effective enforcement against them through the medium of the statutory provisions for revocation of their charter in the state and taking them over in the event of non-compliance with state law.

Neither is it imposed upon interstate activities as such. Nor is it aimed at interstate commerce. Its whole and only purpose is to exert a measure of control over local activities

in the furtherance of a purely local concern. It clearly falls within the language of this Court in *Union Brokerage Co. v. Jensen*, (1944) 322 U. S. 202, 64 S. Ct. 967, 88 L. ed. 887:

> "* * * Nor does it preclude a state from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. * * *"

This regulation does not unduly burden or obstruct interstate commerce for all that the Appellant need do is comply therewith by showing this reserve as a liability. It no more unduly burdens or obstructs interstate commerce than the many instances of valid state regulations viewed in the decision in *California v. Thompson*, (1940) 313 U. S. 109, 61 S. Ct. 930, 85 L. ed. 1219, and the state regulation there sustained. Nor does it burden or interfere with interstate commerce to any greater extent than the regulation in *Parker v. Brown*, (1942) 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315. If California in the interest of the economic well being of its citizens can regulate the quantity of raisins to be sold in interstate commerce how can it be said that Wisconsin may not regulate the conduct of insurance business within its boundaries by providing reasonable solvency requirements in the interest of protecting the financial well being of its citizens and residents and the state itself from the incidents of loss even though the companies doing that business are engaged in interstate commerce?

The regulations sustained in *Hoopeston Canning Co. v. Cullen*, (1942) 318 U. S. 313, 63 S. Ct. 602, 87 L. ed. 777,

were there held valid as not violative of the due process and equal protection clauses of the Fourteenth Amendment. It is submitted that the same tests are to be applied in respect to the question of whether state regulations unduly burden and restrict interstate commerce as are applied in determining whether in their application to foreign or out-of-state companies they are violative of due process. For if the police power justifies a particular regulation of a foreign corporation in doing business in the state so that there is no violation of due process it is because the subject of the regulation is sufficiently localized as to be a proper subject of exercise of the state police power. By the same token the activity regulated being a legitimate subject of local concern it is subject to local regulation even though it be interstate commerce provided the control exerted is not to prohibit interstate commerce but to regulate it.

The *quantum* of the burden or restraint on interstate commerce by this reserve requirement is no greater than has been sustained in other cases where the objective of the state regulation is protection of the welfare of the citizens and residents of the state. Most of the cases are in the field of health, safety and protection from fraud.

But, this does not mean that state regulation is limited to protection in those fields alone. Some of the cases where state regulation of equal burden have been sustained as not unreasonably interfering with interstate commerce are:

Austin v. Tennessee, (1900) 179 U. S. 343, 21 S. Ct. 132 (Prohibition of sale of cigarettes);

Crossman v. Lurman, (1904) 192 U. S. 189, 24 S. Ct. 234, 48 L. ed. 401 (Prohibition of sale of adulterated food and drugs);

Asbell v. State of Kansas, (1908) 209 U. S. 251, 28 S. Ct. 485, 52 L. ed. 778 (Prohibiting importation of cattle unless inspected and passed as healthy);

Engel v. O'Malley, (1911) 219 U. S. 128, 31 S. Ct. 190, 55 L. ed. 128 (Requiring license to receive bank deposits to be transmitted out of state);

Red "C" Oil Co. v. Board of Agriculture of North Carolina, (1912) 222 U. S. 380, 32 S. Ct. 152, 56 L. ed. 240 (Inspection of oil to be sold to determine it is safe for use);

Mutual Film Corp v. Hodges, (1915) 236 U. S. 248, 35 S. Ct. 393, 59 L. ed. 561 (Censorship of moving picture film);

Interstate Busses Corp. v. Holyoke Street R. Co., (1927) 273 U. S. 45, 47 S. Ct. 298, 71 L. ed. 530 (Requirement license to operate bus);

Packer Corporation v. Utah, (1932) 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643 (Prohibition of cigarette advertising);

Bradley v. Public Utilities Commission, (1933) 289 U. S. 92, 53 S. Ct. 577, 77 L. ed. 1033 (Requirement of permit by interstate motor carrier);

Hickey v. Coney, (1933) 290 U. S. 169, 54 S. Ct. 142, 78 L. ed. 247 (Requirement of permit, payment of fee and filing of liability bond by motor carrier);

Pacific States Box & Basket Co. v. White, (1935) 296 U. S. 176, 56 S. Ct. 159, 80 L. ed. 138 (Requiring standard hampers);

Clyde Mallory Lines v. State of Alabama, (1935) 296 U. S. 261, 56 S. Ct. 184, 80 L. ed. 215 (Regulation of harbor traffic);

Bayside Fish Flour Co. v. Gentry, (1936) 297 U. S. 422, 56 S. Ct. 513, 80 L. ed. 772 (Regulation of canning sardines brought from out of state);

Hartford Accident & Indemnity Co. v. Illinois, (1936) 298 U. S. 155, 59 S. Ct. 685, 80 L. ed. 1099 (Requiring bond of commission broker of sales on consignment from out of state);

Bourjois v. Chapman, (1937) 301 U. S. 183, 57 S. Ct. 691, 81 L. ed. 1027 (Prohibition of sale of cosmetics unless registered and found to be harmless);

South Carolina State Highway Dept. v. Barnwell Bros., (1938) 303 U. S. 177, 58 S. Ct. 510, 82 L. ed. 734 (Limiting size and weight of vehicles on highways);

Arkansas Louisiana Gas Co. v. Department of Public Utilities, (1938) 304 U. S. 61, 58 S. Ct. 770, 82 L. ed. 1149 (Requirement of filing of rates by foreign public utility distributing natural gas brought in from out of state);

Felt Tarrant Mfg. Co. v. Corbett, (1939) 306 U. S. 62, 59 S. Ct. 376, 83 L. ed. 488 (Duty to collect state use tax from purchasers);

Milk Control Board v. Eisenberg Farm Products Co., (1939) 306 U. S. 346, 59 S. Ct. 528, 83 L. ed. 752 (License, bond and price fixing for dealers in milk).

III. SECTION 201.18 (1) WISCONSIN STATUTES, AS CONSTRUED AND APPLIED, IS NOT VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

What has been said in the previous subdivision of this brief demonstrates that the regulation here involved is within the police power of the state of Wisconsin and is a reasonable exercise thereof. Appellant, however, asserts that this reserve as it is computed amounts to an attempt by the State of Wisconsin to legislate beyond its borders. It has been pointed out that this statute does not operate extra-territorially in any fashion whatsoever.

The case of *Connecticut General Life Ins. Co. v. Johnson*, (1937) 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673, cited by Appellant is in no way in point. Its only relevancy to this case is that it did involve insurance companies. All it holds is that a state may not tax a foreign corporation where neither the tax in its measure nor in its incidence was related to state transactions.

As said in *Osborn v. Ozlin*, (1939) 310 U. S. 53, 60 S. Ct. 758, 84 L. ed. 1074, and in *Hoopeston Canning Co. v. Cullen*, (1943) 318 U. S. 313, 63 S. Ct. 602, 87 L. ed. 777, that state action of this kind aimed at protection of assureds resident therein may have repercussions beyond the boundaries of the state is of no constitutional significance and the State of Wisconsin does not lose its power to protect the interests of its citizens and residents merely because the company carries on activities in other states.

This reserve requirement does not change or effect anything outside of the state. The company's activities, properties, contracts, and liabilities outside of the state remain untouched and unchanged. All this statute does is provide

for the taking into consideration of its activities and affairs as a whole in testing its solvency and passing upon whether its financial condition is sound and sufficient to be permitted to transact an insurance business in the state with the citizens and residents thereof. There is no attempt to exert any authority beyond the state border. The statute in no way prohibits or regulates the conduct of the Appellant's business outside of the state or what it does there. But, as financial condition necessarily is determined by reference to its entire affairs, a standard of solvency, or perhaps more accurately a standard for showing a reserve liability, in reference to its affairs everywhere is prescribed.

Matters that are outside a state may be taken into consideration in matters of state regulation where they bear a relationship to the interest to be served by the regulation. In *Lone Star Gas Co. v. State of Texas*, (1938) 304 U. S. 224, 58 S. Ct. 883, 82 L. ed. 1304 the value of out-of-state production properties were properly taken into consideration by the Texas Railroad Commission in determining a reasonable rate for the sale of natural gas distributed in Texas. See also *Great Atlantic & Pacific Tea Co. v. Grosjean*, (1937) 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193.

Appellant's contention upon this point which is in substance that Wisconsin cannot exact or impose a reserve requirement which takes into account the over-all financial structure of a company is equivalent to claiming that the state is without power to impose any reserve requirement that has the effect of giving protection to people in Wisconsin in dealing with the company. The only other method of giving any such protection would be by requiring a deposit as a trust fund with some state official to which the people in Wisconsin could resort if they have a claim against the company.

If it were that no other state had any solvency requirement at all would that mean then that Wisconsin could not prescribe one? The answer is obvious that it would not. If Wisconsin cannot impose a solvency standard that is directly concerned with and attempts to take into account liabilities on outstanding risks, but is to be limited just to providing some test based only on things that occur in the state, then as a solvency standard it is wholly valueless. But if it can measure solvency by occurrences within the state then why can it not do so by taking into consideration those factors wherever they take place which are necessary to determining financial condition? It might be that upon the basis of insurance transactions in the state the company would be operating soundly but at the same time transactions elsewhere might be unprofitable and so unsound financially that when its affairs are taken as a whole it would be in unsound financial condition. This shows the fallacy of Appellant's position. For computation of this reserve on the basis of the entire consideration paid by policyholders everywhere is the only possible way for truly testing financial condition as respects those policies.

In this connection it makes reference to the fact that it has a number of agents in the state and has spent considerable in developing its business in Wisconsin. But, any such development and expenditure has been when it was doing business in the state without compliance with the Wisconsin statutory regulations and while it has been operating therein under the injunctions as previously recited.

IV. SECTION 201.18 (1) WISCONSIN STATUTES, AS CONSTRUED AND APPLIED, DOES NOT VIOLATE THE FULL FAITH AND CREDIT PROVISION OF ARTICLE IV, SECTION 1 OF THE UNITED STATES CONSTITUTION.

Here again Appellant's contention is based on the erroneous proposition that this reserve is required only to reflect liability for return of premiums upon future cancellation. It has previously been shown that this is not true.

Whether or not the Appellant meets and complies with the insurance laws of other states cannot and does not preclude the State of Wisconsin from prescribing reasonable standards of solvency and financial soundness. This reserve statute does not deny the Appellant any rights or privileges that it may have in other states or that have been granted to it by them. This statute does not legislate for any territory except its own and were the Appellant's argument upon this point to prevail the effect would be to permit the other states to legislate for the State of Wisconsin.

The cases cited by the Appellant, and particularly *Baldwin v. Seelig*, (1934) 294 U. S. 511, 55 S. Ct. 497, 79 L. ed. 1032 and *Corrington, etc. Bridge Co. v. Kentucky*, (1893) 154 U. S. 204, 14 S. Ct. 1087, 38 L. ed. 962 are not remotely in point. There attempts were made to control what was done in other states. No such attempt is made here. All that is done by the statute here is to control what is done within the state. This statute does not say that life membership fees are premium in the other states. It merely says that for purposes of testing solvency and financial soundness of the company in respect to its affairs as a whole as a basis for determining whether its condition is such that it may safely be permitted to do business in Wisconsin the

total amount paid by policyholders for their insurance protection is the base upon which to compute its future contingent liabilities on unexpired risks. This does not in any way interfere with how other states consider the problem or treat with it.

Were this a suit in Wisconsin to recover a part of premium upon the cancellation of a policy from one of the other states then a different question would be presented. In such a case the liability to the policyholder would necessarily be determined by the law of the state in which the policy was written and the insurance was maintained, and the Wisconsin court would then be bound to apply the law of that state. But, that is quite different from the instant situation where no attempt is made to affect or change the liabilities or rights of the company in the other states.

Again if Appellant's contention here were sound then the other states could not only determine and fix the liabilities and rights of a company but could bind the hands of the legislature of Wisconsin so it could not effectively legislate in respect to its own affairs.

The lack of merit in this contention of Appellant is shown by the following cases:

Western Indemnity Co. v. Rupp, (1914) 235 U. S. 261, 35 S. Ct. 37, 59 L. ed. 220;

American Fire Ins. Co. v. King Lumber Mfg. Co., (1919) 250 U. S. 2, 39 S. Ct. 431, 63 L. ed. 810;

Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California, (1939) 306 U. S. 493, 59 S. Ct. 629, 83 L. ed. 940;

Pink v. A. A. A. Highway Express, (1941) 314 U. S. 201, 62 S. Ct. 241, 86 L. ed. 152.

CONCLUSION

It is submitted that Section 201.18 (1) Wisconsin Statutes, as interpreted and applied, is a valid state regulation and should be sustained.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,
Appellant,

VS.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Petition for Rehearing.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

VS.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Petition for Rehearing.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

With all deference, we respectfully submit that this Court has seriously misapprehended and failed to give proper consideration to the facts of this case. The general legal principles enunciated in the opinion on page 3 are

unassailable; we have never argued to the contrary. The point is that the Court has failed to apply those "settled legal principles to the precise circumstances of this case". (*Northwest Airlines Inc.* v. *Minnesota*, 88 L. Ed. 956, 957).

I.

DUE PROCESS.

This Court says that the Wisconsin Court held that the statute in question (201.18 Wis. Stats.; Orig. Br. 11) "required a reserve which covered the over-all liability of appellant" (Op. p. 2) when the plain fact is that the Wisconsin Court held no such thing. This statement is advisedly made and would not be made if there were any room for difference in construction. If there were room for such difference, we would assume this Court's construction.

So that there can be no question as to what the Wisconsin Court held, here is the language of that Court verbatim (R. 137, 138, 139) (*State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429):

> "Recurring to the ground of the commissioner's refusal of a license first above stated, the commissioner contends that the reserve required by sec. 201.18 (1) is to cover the overall liability of the company and that it was so decided in the former case. The company contends that this reserve is not to cover the company's overall liability, but only its liability to return to its policyholders their unearned premiums in case of cancellation of their policies; and that as in other states the membership fees are not subject to return as unearned premiums in case of cancellations in those states, there is no need or occasion to include fifty per cent of these fees in the reserve set up to secure return of unearned premiums, and that the company has fully met the purpose of the statute by setting up as an unearned premium reserve for

Wisconsin members fifty per cent of the premiums paid by them and fifty per cent of the premiums paid in other states as those states construe premiums.

"We unquestionably decided in the former case that membership fees exacted by the company from its policyholders are a part of the premiums paid by them, and that before the company could have a license to do business in this state it had to set aside a reserve comprising fifty per cent of what it designated as premiums and fifty per cent of the membership fees, in order to meet the requirement of sec. 201.18 (1) That statute is here set out in the margin. The company refuses to do this and seeks to justify its refusal by not exacting the membership fee from its Wisconsin policyholders but to exact from them an increase of the premiums paid by them by an amount equivalent to the membership fees exacted from policyholders in other states. Manifestly this does not meet the requirements of the statute. The statute specifically designates the amount of this reserve. *It requires the designated amount to be maintained wholly independent of the company's solvency in the sense that its assets equal its overall liabilities.* No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it can not have a license to do business in this state and it can not do business in this state without a license authorizing it to do it. The statute is so written and it has been declared valid, and as it is written it must be executed. We are not concerned with the wisdom of the statute, *nor with the probability of the company's meeting the obligation to refund unearned premiums* out of its surplus or its contingent reserve or its other assets. *We are only concerned with the carrying out of the legislative intent evidenced by it.* Nor are we attempting to interfere with the manner in which the company shall do its business in other states or with the manner in which the company's contracts shall be construed in other states. The company seems to think that its constitutional rights are in some way interfered with

by the commissioner's refusal to issue it a license. We are unable to perceive that any such question is involved in view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do.

"*We think this is all that need be said to support an affirmance of the judgment.* If anything else is necessary to an understanding of this decision it may be found in the opinion of the former case." (Emphasis supplied.)

Again with all deference, it is perfectly evident that the Wisconsin Court ignored the presence or absence of a legitimate Wisconsin interest. It wasn't concerned with "the wisdom of the statute" (R. 139). It wasn't concerned "with the probability of the Company's meeting the obligation to refund unearned premiums" (R. 139). It specifically ignored the Commissioner's argument that the reserve required "is to cover the overall liability of the company and that it was so decided in the former case" (R. 137). It, we submit, negated this argument when it said that the reserve had "to be maintained wholly independent of the company's solvency in the sense that its assets equal its overall liabilities" (R. 138).

And when consideration is focused upon its former opinion construing this same statute that it was

"impossible to repel the implication from all this that the amount exacted to cover the cost of insurance shall buy insurance protection which may be so measured *that the unearned portion of the premium deposit may be ascertained and returned*" (*Duel v. State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161, 178; Reply Br. 4; Emphasis supplied)

with the presence of *other Wisconsin statutes specifically designed* to secure the solvency and the ability to satisfy overall liability of appellant (Orig. Br. 16, 38; Reply

Br. 2, 23), ignored in the present opinion, it becomes clearly evident that the Wisconsin court, unable to find any interest to be served by the creation of a reserve to secure a non-existent liability, was forced to concern itself only with "the carrying out of the legislative intent evidenced by" the Statute (R. 139). It was "so written and it has been declared valid and as written it must be executed" (R. 138). It was constitutional because "the company is required only to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do" (R. 139).

Now for a Court to say, in view of the foregoing and the record, that the Wisconsin Court held that this statute "required a reserve which covered the overall liability of appellant" reminds us of the rescue of Jim by Tom Sawyer as related by Dean Pound in The Spirit of the Common Law on pp. 166, 167:

> "When Tom Sawyer and Huck Finn had determined to rescue Jim by digging under the cabin where he was confined, it seemed to the uninformed lay mind of Huck Finn that some old picks the boys had found were the proper implements to use. But Tom knew better. From reading he knew what was the right course in such cases, and he called for case-knives. 'It doesn't make no difference,' said Tom, 'how foolish it is, it's the *right* way and it's the regular way. And there ain't no other way that I ever heard of, and I've read all the books that gives any information about these things. They always dig out with a case-knife.' So in deference to the books and to the proprieties the boys set to work with case-knives. But after they had dug till nearly midnight and they were tired and their hands were blistered and they had made little progress, a light came to Tom's legal mind. He dropped his knife, and, turning to Huck, said firmly, 'Gimme a case-knife.' Let Huck tell the rest:
>
> "'He had his own by him, but I handed him mine. He flung it down and says, "Gimme a *case-knife.*"

> "'I didn't know just what to do—but then I thought. I scratched around amongst the old tools and got a pickax and give it to him, and he took it and went to work and never said a word.
>
> "'He was always just that particular. Full of principle.'"

There is, of course, no escape from the soundness of this Court's language that "Wisconsin has a legitimate concern with the financial soundness of companies writing insurance contracts with its citizens" (Op. p. 3). Its relevancy to a case not decided upon a solvency premise and where the financial soundness of the company was well established (Orig. Br. 8, 9, 16, 32) and undisputed (Orig. Br. 16) is not readily apparent. This Court has distinguished itself by its rigid adherence to the precise facts of the case in considering constitutional problems. We fail to understand why there was omitted from the opinion any reference to undisputed facts relative to appellant's solvency and its admitted conformance to the general solvency statutes of Wisconsin (Wis. Stats. 201.03; 201.32; 204.27; 204.28), statutes designed to secure overall solvency and to guarantee "financial soundness of companies writing insurance contracts" with the citizens of Wisconsin (Orig. Br. 16, 32, 58; Reply Br. 2, 23-27).

In this case, the authoritativeness of *Osborn* v. *Ozlin*, 310 U. S. 53 and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, is likewise not readily apparent. Hoopeston recognized specifically that the question was whether the legislation so affected New York interests as to give it "the power it claims" (Orig. Br. 36, 37, 38). Osborn pointed out carefully that what Virginia had done was "very different from the imposition of conditions upon appellant's privilege of engaging in local business which would bring within the orbit of state powers matters unrelated to any local interests" (p. 65; Orig. Br. 38). Hoopeston dealt with "stipulated operating reserves for

payment of losses, for a contingent liability of subscribers of not less than one nor more than ten times the amount of annual premium expressed in the contract and for a surplus to be maintained unimpaired'' (*Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 320).

We conform to the similar Wisconsin statute relative to ''operating reserves for payment of losses'' (Wis. Stats. 204.27, 204.28; Reply Br. 23). The reserve to secure the contingent liability of subscribers is not material here because we are not a reciprocal but a non-assessable mutual. We conform to the similar Wisconsin statute relative to ''a surplus to be maintained unimpaired'' (Wis. Stats. 201.03; Orig. Br. 58). In fact our surplus is more than two hundred times that required by the Wisconsin statute (Reply Br. 2, 3). Hoopeston didn't seek to create a reserve for a liability nonexistent, much less did it try to do so on business transacted without its borders. The plain fact is that we have never argued against the ''principles announced'' in Hoopeston and Osborn.

Those principles were carefully noted and adequately stated in Hoopeston thus: ''* * * The issue remains whether the insurance enterprise as a whole so affects New York interests as to give New York the power it claims''. Conceded there may be a ''measuring rod of financial stability or strength'', this ''rod'' must, nevertheless, measure ''liability'' (contingent or actual). When this Court said in the instant case ''any financial statement requested by Wisconsin or any other state would need reflect all assets and liabilities of the company in the interest of truth'', the characteristics of the ''measuring rod'' were thereby defined. ''Assets and liabilities'' are exact terms whether ''accounting is an exact science'' or not. These items are identified and defined by the contract where made and the laws under which enforced. To ignore the effect of a contract as applied in another state and to insist that what is not a liability in 36 states

may, nevertheless, be treated as a liability in Wisconsin neither "measures solvency" nor reflects "assets and liabilities" in the "interest of truth". As applied in this case the "rod" is a "rod in pickle" and not a "measuring rod".

Because this is a result of the Court's decision, the cases relied on and the principles quoted therefrom have been incorrectly applied. In the cases cited "local interest" was present and the means to protect it was appropriate. Here the local interest extends only to obtain a *correct* report or statement of "assets and liabilities" as defined by the contract and the laws of the other states. Instead the State of Wisconsin requires the company to state under oath as the truth what is, in fact, untrue. An untruth can measure neither financial "soundness" nor "future contingent liability".

There can be no escape from the premise that the Wisconsin requirement requires us to falsify our assets and liabilities (Reply Br. 19; Orig. Br. 31) and this with reference to business transacted entirely without its borders (Orig. Br. 31). *This statute by its terms is an unearned premium or reinsurance reserve statute. It is nothing else by its terms.* As twice construed by the Wisconsin Supreme Court its purpose was to insure *"that the unearned portion of the premium deposit may be ascertained and returned"* (*Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161, 178, Reply Br. 4; emphasis supplied). That Court never construed the statute in any other light. It was unconcerned "with the probability of the company's meeting its obligation to refund unearned premiums" (R. 139) in the instant case. Here is the second time where that Court indicates its conception of that statute. It was constitutional because of its equal operation upon all. Wisconsin had the right constitutionally to impose a requirement which had nothing to do with actual liability if it operated upon all alike, is the sole *rationale* of the Court.

From the technical insurance reserve standpoint, the Wisconsin court understood the problem. This Court didn't follow the Wisconsin court's opinion. Insurancewise, the Wisconsin court knew that this statute was designed primarily to secure the liability to refund unearned premiums, that a reserve which satisfied that liability was amply sufficient to satisfy that statute, that the reserve was one reserve and that reinsurance presented no problem (Reply Br. 5, 6). It was for this reason that it held the statute constitutional because of its equal operation upon all.

Insurancewise, the Attorney General of Wisconsin understands the problem. It was for this reason, in view of the Wisconsin Court's construction, that he argued that the reserve "is merely a bookkeeping entry, there is no segregation or trust-funding of assets for this reserve liability" (Opp. Br. 16) ignoring his own authorities to the contrary (Reply Br. 11, 12). It was for this reason that he was compelled to argue for a broader construction of the statute than that placed upon it by the Wisconsin Court (Opp. Br. 13, *et seq.*) to sustain it. Has he one place in his brief quoted any reference to either of the Wisconsin opinions to sustain any of his theories as to the meaning and purpose of this statute? He has not! He quotes from text writers (Opp. Br. 15, 16) ignoring our text authority (Orig. Br. 23) with whom the Wisconsin Court agreed (Reply Br. 4).

Now then, the purpose of the statute being to insure "that the unearned portion of the premium deposit may be ascertained and returned", obviously means returned to the policyholder. It is satisfied therefore by a reserve which secures that purpose and discharges that liability. Wisconsin doesn't and couldn't argue that the liability of the company to return unearned premiums must be fixed by the law of Wisconsin regardless of where the business was conducted (Orig. Br. 31, *et seq.*) and this

Court says that "any financial statement required by Wisconsin or any other state would need reflect all assets and liabilities of the company in the interests of truth", but the fact remains that required is a financial statement which does not in law or fact reflect those assets and liabilities truthfully (Orig. Br. 31-38; Reply Br. 19).

It is certainly obvious that the liability to return "the unearned portion of the premium deposit", being the sole purpose of the statute as we are advised by the Wisconsin Court, is required to be falsely stated. Notwithstanding no liability to return any part of membership fees in those states which recognize them as no part of the premium, the Wisconsin requirement compels us to set aside 50% of those moneys as a reserve in trust and show on our books a liability to return a part of such money as an "unearned portion of the premium deposit" when no such liability exists. Before the Wisconsin requirement can "reflect all assets and liabilities of the company in the interests of truth" these non-Wisconsin transactions must create a liability in fact and in law enforceable in Wisconsin.

Would anyone contend that Wisconsin had the right to make that a liability which was not one by the law of the state where the transaction occurred? Let us assume a policy is issued in Illinois to an Illinois resident. He pays a $10.00 membership fee and a $50.00 premium. He cancels the policy the next day. He sues in Wisconsin to recover the unearned portion of the premium deposit. Could a Wisconsin court say that the premium deposit was $60.00 when Illinois law says that it is $50.00? Obviously not (*Hartford A & I Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 149, and cases cited; Orig. Br. 35, *et seq.*) yet the Wisconsin requirement compels us to reflect upon our books a liability based upon a premium deposit of $60.00 on this identical transaction. Thereby we are re-

quired to base a contingent liability on a sum of $60.00 when our actual legal contingent liability is based upon a sum of $50.00.

It is obvious that the financial statement required of us by Wisconsin does not "reflect all the assets and liabilities of the company in the interests of truth". Thereby we are between Scylla and Charybdis. By conforming to the Wisconsin requirement, we cannot conform to this Court's opinion that "any financial statement required of us by Wisconsin or any other state would need reflect all assets and liabilities of the company in the interests of truth". The precise point is that Wisconsin is hereby regulating our "out of state activities through such a requirement", posing "different questions". Factually at bar, the precise point is that Wisconsin requires a false financial statement, a requirement proscribed by due process (Reply Br. 18, 19). Recognizing the rule (Op. p. 4; *American Tel. & Tel. Co.* v. *U. S.*, 299 U. S. 232, 240; Reply Br. 19) this Court fails to apply it because of its misconception of the facts.

Where is there here any benefit to a Wisconsin citizen? This Court points out none. Neither did the Wisconsin Court. We argued this point factually at considerable length (Orig. Br. 22, 23, 38; Reply Br. 18, 19) and certainly it is not answered by generalities which disengage themselves from "the precise circumstances of this case" (*Northwest Airlines, Inc.* v. *Minnesota*, 88 L. Ed. 956, 957).

II.

FULL FAITH AND CREDIT.

Inherent in the Court's conclusion under this heading is the false premise that because "Illinois * * * does not treat membership fees as a part of the premiums" ap-

pellant claims "that Wisconsin may not do so". We do not and never did argue that Illinois could fix financial standards for Wisconsin or determine the incidents of contracts written in Wisconsin. We do not and never did argue that if Wisconsin had a superior interest full faith and credit required her to apply foreign law regardless of such interest (Orig. Br. 42, 43). We did argue, and we think it is clear, that in order for Wisconsin to exercise the power she claims, it must affirmatively appear, that what is done under foreign law in a foreign state has an ascertainable impact in Wisconsin or upon her citizens. Until then, there can be no "conflicting *interests*" to be accommodated and the positive rule of full faith and credit must therefore be applied. It never has been held that one state may "override the laws and policy of another" and thereby transform a transaction vesting absolute title in funds collected in another state into one involving continuing liability. To permit Wisconsin to require a foreign company to reflect untruthful and unreal transactions upon its books as a condition for admission to Wisconsin can furnish no "appropriate means of protecting its (Wisconsin's) own citizens" because it has no relationship to any interest that Wisconsin may have. These considerations have been ignored in the opinion of the Court.

What Wisconsin interest was identified in the opinion of the Wisconsin Court? The case boils down to the question of whether this Court is going to follow the construction the Wisconsin Court placed upon its Statute or that of the Attorney General. While this Court speaks loosely of "Wisconsin's prerogative to select the appropriate means of protecting its own citizens by establishing financial standards for companies which exploit the opportunities which Wisconsin affords", this Court, like the Wisconsin Court, is silent as to the specific manner in

which, under "the precise circumstances of this case", those citizens are protected.

Are they protected by the creation of a reserve to secure a non-existent liability, by a reserve which freezes free assets of the company (Orig. Br. 22, 23)? Are they protected by the creation of a reserve from monies collected elsewhere to be held in trust for the benefit of those from whom it is collected? Certainly the Wisconsin Court knew whether there was present or absent a legitimate state interest and it spoke of none. The point is that these questions are unanswerable and therefore the Statute was constitutional because of its equal operation upon all and not because the interests of Wisconsin were superior to those of the foreign state. How could appellant show in this case that "of the conflicting interests involved those of the foreign state are superior to those of the forum," when the forum didn't decide the case on a question of interest, notwithstanding the point being urged upon it. And when full faith and credit is interposed, is it full faith and credit for this Court to construe the Statute differently than did the State Court, to construe the Statute as if it were construed by the State Court on the issue of state interest and say that a private litigant had failed to carry a burden which the State Court didn't construe as constitutionally pertinent. It is for Wisconsin to state the interest of Wisconsin, if in fact one appears, and not for this Court to state the interest of Wisconsin. It is for this Court to accept the construction of the State Court.

There is no escape from this premise insofar as the record in this case is concerned. Is it Wisconsin's constitutional prerogative to create a reserve to secure a liability that doesn't exist as to occurrences beyond its borders merely because it operates equally on all companies doing business in Wisconsin? That is the precise

constitutional point presented to this Court, not only from the standpoint of full faith and credit, but also from the standpoint of due process.

If the full faith and credit clause doesn't preclude such conduct then it is idle to talk of it as a "nationally unifying force". Without interest or reason is Wisconsin to be permitted to ignore "The Constitution" and "first principles of legal thinking" which "allow the law of the place where the contract is made to determine the validity and consequences of the act" (Holmes, J., in *Mutual Life Ins. Co.* v. *Liebing*, 259 U. S. 209, 214; Orig. Br. 42; Reply Br. 20).

III.

COMMERCE.

The suggestions hereinafter are for consideration only in the event this petition be denied as to the due process and full faith and credit issues. In which event, we respectfully submit that the opinion of the Court and the mandate to follow should be revised so as to vacate the judgment with directions for further proceedings on the commerce question in order to fully protect appellant's rights.

The opinion recognizes that we are entitled to a hearing upon the commerce point and that "customary procedure has been for the court to vacate the judgment of the state court where there has been a supervening event * * * and to remand the case so that the court from which it came might consider the question in the light of the changed circumstances". This procedure the Court "would not hesitate to adopt * * * in the interests of justice if it appeared that otherwise appellant would be foreclosed from an adjudication of the issue". That customary procedure

is not followed because we have not shown that we would be otherwise prejudiced and because this Court is of opinion that we cannot be.

With all deference to this Court, there is some probability that very serious and prejudicial action might conceivably ensue. We assumed in our original brief that customary procedure would be followed (Orig. Br. 12, 43). Therefore, we did not mention the fact that one of the terms and conditions imposed by the Wisconsin Court upon this appeal was a requirement that appellant post a penal bond in the sum of $50,000.00,

> "conditioned that if the State Farm Mutual Automobile Insurance Company, an Illinois corporation, shall pay all penalties and fines which may be imposed under Section 348.488, Wisconsin Statutes, and shall not later than the first day of September, 1944, file with the Clerk of the Supreme Court of Wisconsin, to be held by said Clerk subject to the further order and disposition by this Court, a list of policies written or renewed by defendant in this state during the period between May 1, 1942, and April 30, 1944, and showing as to each policy the name of the person to whom such policy was issued, the date thereof and the amount of premium received therefor, then the said bond shall become void.
>
> "Said bond having been filed with the petition herein and being in due form and in proper amount, is accordingly approved." (R. 5)

Let us consider the fact that Mr. Justice Jackson expressed "doubt that the Wisconsin Supreme Court can open and re-examine a judgment after it is affirmed by this court". This Court cites *Angers* v. *Sabatinelli*, 235 Wis. 422, id. 239 Wis. 364, to support the statement that the power to allow an amendment "exists after the case has been remanded to the trial court following an affirmance by the Wisconsin Supreme Court". That case went up on demurrer, a special statute of Wisconsin allowing

an appeal from such an interlocutory order (Wis. Stats. 274.33). No final judgment had ever been entered in that case. That case doesn't hold that upon the affirmance of a final judgment by the Wisconsin Supreme Court or this Court, that the parties under Wisconsin law may replead upon the filing of a mandate which affirms a final judgment and no Wisconsin case so holds, as far as we have been able to find. Its authority as a precedent is obviously limited to its facts and anything the Court there said is likewise limited to those facts.

To properly present the issue we have to get this case back to the Dane County Circuit Court from which it originated. That Court can only follow the mandate of the Wisconsin Supreme Court. The way it stands now, we probably have to present to the Wisconsin Supreme Court a motion to frame its mandate to the Circuit Court of Dane County. Probably with that motion, we would have to present proposed and suggested amendments to the pleadings. The matter being without precedent, we really don't know what correct procedure dictates. We know of no source from which we can determine such procedure. What substantial reason can there be in requiring these unusual and unprecedented steps when the rights and interests of all parties can best be protected by following customary procedure in this case?

Appellant can obtain no authoritative adjudication from the Wisconsin Court until after the mandate of this Court reaches that Court and its motion or other required pleading is presented to that Court. If the Wisconsin Court took the view that it could not re-examine an affirmed judgment, then appellant is in serious difficulty. Action could be brought upon the bond to collect the fines and penalties which appellee contends should be imposed and for which the bond is given. These fines and penalties would be for conducting business in Wisconsin illegally

for the period in question. The attendant loss of good will resulting therefrom is obvious. The condition of the bond being absolute, recovery might be had thereon even though it ultimately be determined that the commerce clause precluded the Wisconsin requirement. All of this could happen regardless of whether the Wisconsin Supreme Court was right or wrong on this question and appellant would be left to the dubious remedy of a mandamus from this Court to compel the Wisconsin Court to follow the spirit and letter of this Court's opinion and mandate.

It is obviously the intent of this Court to preserve the *status quo* until all questions which appellant has a constitutional right to urge are decided. The only reason moving this Court to refuse to vacate this judgment was because it "did not think it was necessary". Because of the foregoing considerations, we submit that it is necessary to follow customary procedure. Furthermore, the record in the 1944 proceeding is not and never has been before this Court. It was merely mentioned by the appellee in his brief (p. 20). Because it was *dehors* the record, we ignored the statement in reply and didn't point out that the issues in that case are not precisely the same as the issues in this case. That case does not afford us the remedy or freedom from prejudice afforded by this case in presenting the commerce issue.

Furthermore, we are reasonably apprehensive that the Wisconsin Court might take a view at variance with that of this Court relative to its power to permit a repleading upon an affirmance of its judgment by this Court. Only by a vacation of the judgment can appellant's rights be secured from prejudice without question. If it is the ruling of this Court that appellant be denied a rehearing on due process and full faith and credit, it can be so stated in this Court's opinion and the opinion and man-

date can read, "affirmed as to due process and full faith and credit and vacated and remanded for further proceedings not inconsistent with this opinion". In this way, customary procedure is followed, removing all doubt of the probability or possibility of prejudice to appellant until all of the questions which appellant has a constitutional right to raise are determined in this proceeding.

IV.

CONCLUSION.

For the reasons above stated, appellant respectfully submits that a rehearing be granted. Should the Court decide to adhere to its opinion on the constitutional questions relating to due process and full faith and credit, appellant respectfully suggests that to protect appellant on the commerce question the opinion and mandate should be modified as follows: "Affirmed as to due process and full faith and credit, and vacated and remanded for further proceedings not inconsistent with this opinion."

Respectfully submitted,

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CERTIFICATE.

I, Barnabas F. Sears, one of the attorneys for appellant, hereby certify that the foregoing petition for rehearing is filed in good faith and not for purposes of delay.

BARNABAS F. SEARS.

March 7, 1945.

SUPREME COURT OF THE UNITED STATES.

No. 115.—October Term, 1944.

State Farm Mutual Automobile Insurance Company, an Illinois Corporation, Appellant, *vs.* Morvin Duel, Commissioner of Insurance of the State of Wisconsin.	Appeal from the Supreme Court of the State of Wisconsin.

[February 12, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a) from the judgment of the Wisconsin Supreme Court which sustained the constitutionality as construed and applied to appellant of § 201.18 of the Wisconsin Statutes, 1943. 244 Wis. 429.

Sec. 201.18 reads as follows:

> "Reserves, basis for. (1) The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by section 201.50.
>
> "(2) Where no other provision is made therefor by law, the reserves of any insurance company shall be calculated upon such basis, method and plan as shall fully provide for all liabilities, and any basis, method and plan fixed by the order of the commissioner shall be prima facie just, reasonable and proper."

The insurance commissioner of Wisconsin refused appellant a license in 1942 and also in 1943 for failure to comply with that provision. Appellant accordingly brought suits to enjoin the commissioner from interfering with its business and to require him to issue it a license to do business in the State for the years in question. The facts may be briefly stated.

Appellant is an Illinois corporation doing business in many States. It started doing business in Wisconsin in 1939. It writes various forms of automobile insurance on the mutual plan. When it writes a policy for a new customer, it charges him a membership fee in addition to a premium. The membership fee is not returnable but entitles the insured to insure one automobile so long as he remains a desirable risk and so long as the company continues to write such coverage. It is said that the membership fee gives a life option to the insured to purchase insurance at a saving of from twenty to thirty-five per cent of the usual cost. Appellant has contended that the membership fees are no part of the premiums, furnish no insurance protection, and merely reimburse it for the expense of obtaining the new business. Wisconsin took a different view. The commissioner refused renewal of appellant's license for the years ending May 1, 1940, and May 1, 1941. Litigation followed which resulted in the decision of *Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161. The Wisconsin Supreme Court held as a matter of law that the membership fees were part of appellant's premiums and that 50 per cent of them must be included in the reserve required by § 201.18. Thereupon appellant adopted and submitted to the commissioner a new scheme for doing business in Wisconsin. The plan was to abandon the membership fee in Wisconsin, to require none of its Wisconsin policyholders, and to do business in Wisconsin on a level premium basis. The result was that the premiums required to be paid in Wisconsin were 27 per cent higher than those required in States which construed premiums as not including membership fees. The commissioner refused to grant appellant the licenses for these later years because its reserve required by § 201.18 did not include 50 per cent of the membership fees obtained on business written in other States. The present litigation ensued. The Wisconsin Supreme Court sustained the commissioner, holding (1) that § 201.18 required a reserve which covered the over-all liability of the appellant and (2) that § 201.18 as construed and applied did not contravene appellant's constitutional rights.

Of the three constitutional questions argued here two were raised below. They are that the statute violates (1) the due process clause of the Fourteenth Amendment and (2) the full faith and credit provision of Art. IV, Sec. 1. We think neither of the two has merit.

I. So far as due process of law is concerned, this case is governed by the principles announced in *Osborn* v. *Ozlin*, 310 U. S. 53, and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313. In *Osborn* v. *Ozlin*, *supra*, p. 62, we stated that "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." We sustained in that case Virginia legislation which forbade a licensed company to write insurance in Virginia except through a resident agent and which provided that the resident agent could not retain less than one-half of the customary commission even though the business originated with an out-of-state broker, the resident agent rendering only a perfunctory service. We held that by such measures Virginia was seeking to protect the interests of her citizens, not to prohibit the making of contracts beyond her borders. In *Hoopeston Canning Co.* v. *Cullen*, *supra*, we sustained provisions of the New York Insurance Law as applied to reciprocal insurance associations licensed to do business in New York but with headquarters in Illinois. The regulations which New York had imposed included stipulated operating reserves for payment of losses, a contingent liability of subscribers of not less than one nor more than ten times the amount of the annual premium expressed in the contract, and a requirement for the maintenance of an unimpaired surplus. We said, "Neither New York nor Illinois loses the power to protect the interests of its citizens because these associations carry on activities in both places. . . . We think the regulations themselves, since they are aimed at the protection of the solvency of the reciprocals or at promoting the convenience with which New York residents may do their insurance business, are all within the scope of state power." 318 U. S. p. 321.

Wisconsin has a legitimate concern with the financial soundness of companies writing insurance contracts with its citizens. The reserve which it requires under § 201.18 is designed to measure the entire future contingent liability on unexpired risks. That contingent liability is obviously relevant in any appraisal of the financial soundness and stability of the company. It is to be sure a bookkeeping requirement. But it is more than that: It is one of Wisconsin's measuring rods of financial stability and strength. Any financial statement required by Wisconsin or any other State would need reflect all assets and liabilities of the company in the

interests of truth. Their inclusion does not mean that out-of-state activities are being regulated by Wisconsin. It only means that solvency of a multi-state business can hardly be determined on a single state basis. Accounting is no exact science. The due process clause certainly does not require uniformity in requirements for financial statements of companies doing a multi-state business. Each State must necessarily have leeway in providing its own accounting standards for companies doing business within its borders. If a state undertook to regulate out-of-state activities through such a requirement, different questions would be posed. But we fail to see that Wisconsin has done that here. We cannot say that the reserve required by Wisconsin has any purpose but the protection of its own citizens. Its adequacy or appropriateness as a standard for qualification to do business in Wisconsin is therefore a question for Wisconsin to determine.

II. Little need be said in reply to the contention that the Wisconsin statute as construed and applied violates the full faith and credit provision of the Constitution. Appellant's argument comes down to this: Illinois, the state of incorporation, does not treat the membership fees as a part of the premiums. Therefore, Wisconsin may not do so. The result would be that no State could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation. The full faith and credit provision requires no such result. This Court has recognized that "In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states" is imperative. *Alaska Packers Assn* v. *Industrial Accident Commission*, 294 U. S. 532, 547. The full faith and credit provision may not be used to compel one State "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 501. He who challenges the power of one State to enforce in its own courts its own statutes on such grounds carries the burden of showing that "of the conflicting interests involved those of the foreign state are superior to those of the forum." *Alaska Packers Assn* v. *Industrial Accident Commission*, *supra*, p. 548. That burden has

not been carried here. Wisconsin obviously has a considerable interest in the financial soundness and stability of foreign as well as domestic companies doing business in Wisconsin. It is not apparent how Illinois has a superior interest. As among the several States it is Wisconsin's prerogative to select the appropriate means of protecting its own citizens by establishing financial standards for companies which exploit the opportunities which Wisconsin affords.

III. Appellant's remaining contention is that this Wisconsin statute as construed and applied violates the Commerce Clause of the Constitution. Art. I, Sec. 8. This question was not raised below. It emerged after the jurisdictional statement was filed here on June 1, 1944. For on June 5, 1944, we decided *United States* v. *South-Eastern Underwriters Assoc.*, 322 U. S. 533, holding that the fire insurance business was commerce within the meaning of the Commerce Clause and the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 and § 2. Since the Wisconsin Supreme Court did not pass on the question, we may not do so. *McGoldrick* v. *Compagnie Generale Transtlantique*, 309 U. S. 430, 434. But our decision in the *South-Eastern Underwriters* case was a supervening event arising in the course of this litigation. We do not think appellant should be prejudiced by the fact that the decision came too late for it to obtain a ruling by the Wisconsin court. The question is what disposition we should make of this appeal so that in the interests of justice appellant may have a hearing on the commerce point.

A customary procedure has been for the Court to vacate the judgment of the state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances. *Gulf, Colorado & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503; *Missouri* v. *Public Service Commission*, 273 U. S. 126; *Pagel* v. *MacLean*, 283 U. S. 266; *Patterson* v. *Alabama*, 294 U. S. 600, 607; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 156. See *Dorchy* v. *Kansas*, 264 U. S. 286, 291. In those cases the supervening event had raised questions of state law which might have warranted a reversal of the judgment. If they were adequate, it would be unnecessary to reach the federal questions which were presented. Moreover, it appeared in some of those cases that unless the judgment of the state court were vacated, the opportunity to

raise the new questions which had emerged might be lost. See *Gulf, Colorado & S. F. Ry. Co.* v. *Dennis, supra; Pagel* v. *MacLean, supra.* It is suggested that the course should be followed here so that this additional federal question may be passed upon by the Wisconsin Supreme Court. We would not hesitate to adopt that procedure in the interests of justice if it appeared that otherwise appellant would be foreclosed from an adjudication of the issue. Appellant does not show that it would be. Respondent assumes in its brief that appellant will not be foreclosed. And we think that assumption is warranted for the following reasons.

We are advised that appellant has pending in the Wisconsin courts another suit in respect to the license year commencing May 1, 1944. Wisconsin has the familiar rule that though the validity of the law in question might have been determined in an earlier suit, the prior judgment is not *res judicata* where the second suit is on a different cause of action in absence of evidence to show that the question was actually presented to the court and decided in the earlier litigation. *Wentworth* v. *Racine County*, 99 Wis. 26, 31; *Grunert* v. *Spalding*, 104 Wis. 193, 213-214; *Lindemann* v. *Rusk*, 125 Wis. 210, 237. But if that principle is inapplicable here it is nevertheless the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation. 2 Freeman on Judgments (5th ed. 1925) § 713; *Blair* v. *Commissioner*, 300 U. S. 5, 9; *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 654, 662; *In re Pomeroy*, 51 Mont. 119; *Hurd* v. *Albert*, 214 Calif. 15, 26. We cannot find that Wisconsin has a different rule.

The Wisconsin statute, moreover, gives the court power to allow an amendment "at any stage of any action or special proceeding before or after judgment, in furtherance of justice and upon such terms as may be just" provided that "the amended pleading states a cause of action arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based." Wis. Stat. 1943, § 269.44. That power has been construed very liberally. *Kennedy* v. *Waugh*, 23 Wis. 468; *Post* v. *Campbell*, 110 Wis. 378; *Mallon* v. *Tonn*, 163 Wis. 366; *Micek* v. *Wamka*, 165 Wis. 97; *Turner Mfg. Co.* v. *Gmeinder*, 183 Wis. 664; *Kaegi* v. *Industrial Commission*, 232 Wis. 16. And it exists after the case has been remanded to the trial court following an affirmance by the Wis-

consin Supreme Court. See *Angers* v. *Sabatinelli*, 235 Wis. 422; *id.*, 239 Wis. 364.

We conclude that appellant is not foreclosed under Wisconsin procedure from obtaining a determination in the Wisconsin courts of the commerce clause question either in the present suits or in the other pending one. Accordingly we do not think it is necessary to vacate the judgment below in order that appellant may have an opportunity to obtain the ruling.

Affirmed.

Mr. Justice ROBERTS dissents.

Mr. Justice JACKSON.

I think that the judgment below should be vacated rather than affirmed and do not, therefore, reach the constitutional questions dealt with in the Court's opinion. I doubt that the Wisconsin Supreme Court can open and re-examine a judgment after it is affirmed by this Court. As the Court recognizes, to vacate is the procedure that has been followed when similar situations have been presented heretofore.